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N.C. REPORTS

OF

CASES IN LAW,

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA,

From June Term, 1850, to December Term, 1850, Both Inclusive.

BY JAMES IREDELL.

VOLUME XI.

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JUDGES

OF THE

SUPREME COURT OF NORTH CAROLINA,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. THOMAS RUFFIN, CHIEF JUSTICE.
HON. FREDERIC NASH.
HON. RICHMOND M. PEARSON.

JUDGES OF THE SUPERIOR COURTS,

HON. THOMAS SETTLE.
HON. JOHN M. DICK.
HON. JOHN L. BAILEY.
HON. MATTHIAS E. MANLY.
HON. DAVID F. CALDWELL.
HON. WILLIAM H. BATTLE.
HON. JOHN W. ELLIS.

ATTORNEY GENERAL,

BARTHOLOMEW F. MOORE, ESQUIRE.

CLERK AT RALEIGH,

EDMUND B. FREEMAN, ESQUIRE.

CLERK AT MORGANTON,

JAMES R. DODGE, ESQUIRE.

REPORTER,

JAMES IREDELL.

MARSHALL,

J. T. C. WIATT.

108005

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CASES AT LAW

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

NORTH CAROLINA.

AT RALEIGH

JUNE TERM, 1850.

SAMUEL H. CHRISTIAN v. BARNABAS NIXON, et al,

In general, a vender of land is bound to prepare the conveyance and tender it or offer to do so, but where, from the nature of the contract it appears, that those, to whom the title was to be made, were unknown to the vendor, but known to him who made the purchase, the latter is bound to give the necessary information to the vendor, or, if he fails, to pay the price contracted for.

Appeal from the Superior Court of Law of RANDOLPH County, at a Special Term in July, 1849, his Honor, Judge *Battle*, presiding.

No counsel for the plaintiff.

G. C. Mendenhall, for the defendant, submitted the following authorities:

To establish the doctrine of concurrent acts and dependent conditions in contracts, see Smith's leading cases,

page 9, 13 division. 8 T. R., page 366, case of *Glazebrook* v. *Woodrow*, see whole opinion of GROSE, J. 1 Saunders Rep., 320, William's notes, division 5, top page 320, and case of *Pordage* v. *Cole*. 1 Blackford's Reports, 175, the case of *Leonard* v. *Bates*, and *note*. 10 Johns. Rep., 266, the case of *Jones* v. *Gardner*. 2 John. Rep., 207, case of *Green* v. *Reynolds*, see whole opinion of the Court. 15 Massachusetts Rep., 500; *Gardiner* v. *Corson*, see JACKSON, J., on 474, top page. 2 Iredell, 297; *Gardiner* v. *King*. 4 Dev., 283, *Cowper* v. *Saunders*. 1 Ventris, *Large* v. *Cheshire*. Salk., 112, *Col.* v. *Briggs*. Stephen, Nisi Primus., 1072. 58 E. C. L. Repts., 164, *Sanders* v. *Opie*, 2 Saund, 350. 4 T. R., 763. 1 East., 203, *Ransom* v. *Johnson*, see Kenyon's opinion, 206 top. 4 Iredell, 497, *Clayton* v. *Blake*. 2 Pickering, 292. 1 Strange, 569 *Lock* v. *Wright*.

PEARSON, J. Phineas Nixon, Sen., owned a tract of land, to which the plaintiff alleged he had acquired title, under a sale for taxes. After the death of the said Phineas, his executors, Phineas, Jr., Barnabas Nixon, in behalf of their testator's estate, proposed to buy the claim of the plaintiff: and fifty dollars was finally agreed on as the price. The contract was closed by a letter from Phineas Nixon to the plaintiff, in which he says, "Thou may'st consider this as our promise to pay thee fifty dollars for thy quit-claim belonging to the estate of our father." Signed "Phineas Nixon, Ex'r. of Phineas Nixon, dec'd."

Phineas Nixon, Jr., afterwards died, and the defendants administered upon his estate. The plaintiff called on the defendant Barnabas for the $50, and told him he was ready to execute the quit-claim deed, if he knew to whom to make it, and asked who were the persons entitled as heirs of Phineas Nixon, Sen., and to whom he should make the deed. The defendant refused to pay the money and declined giving the information requested. The

plaintiff then issued a warrant for the fifty dollars. His Honor was of the opinion that the plaintiff had not made out a case. In this there was error.

The payment of the money and the execution of the deed were concurrent acts; and the plaintiff was not entitled to the money, until he had performed, or offered to perform, his part of the agreement.

As a general rule, it is the duty of the vendor to prepare the deed, and deliver, or offer to deliver it, to the vendee, this being embraced in what he has agreed to do in consideration of the price. The case is different in England, in consequence of the peculiar circumstances existing in that country, which make conveyances extremely complicated. Those circumstances do not exist here, and we are governed by the rule, that each party must do or offer to do all he has undertaken, before he can require performance of the other. The preparation of the deed is considered a part of the vendor's undertaking, unless the terms of the contract furnish an inference to the contrary. When the land to be conveyed and the person to whom the deed is to be made are certain, so that the vendor knows how to make it, it is his duty to do it; but when the contract is general and the person to whom the vendor may wish the deed made, is not ascertained, then it is the duty of the vendee to prepare the deed, or at all events to give the vendor such information as will enable him to do it. This is necessarily implied from the fact, that the contract is left open in this particular; for otherwise the vendor would be required to do an impossibility, and the refusal of the vendee to give this information, which lies within his knowledge, evinces a desire on his part to have a pretext for avoiding his contract.

In this case, the contract was made in behalf of those, who were entitled to the land, as devisees or heirs of Phineas Nixon, Sen. The plaintiff is not presumed to

know them, but the fact is within the knowledge of the defendants. It was their duty to give the information; by withholding it, they put it out of the power of the plaintiff to make the deed. They cannot take advantage of their own wrong, and thus escape from the performance of a contract of their intestate.

PER CURIAM. There must be a *venire de novo*.

JOHN PATTERSON v. WILLIAM BODENHAMMER, et al.

The action of trespass *quare clausum fregit* is a remedy for an injury to the possession, and therefore cannot be maintained by one who had not the possession, at the time the injury was alleged to have been committed. The cases of *Dobbs* v. *Gullidge*, 4 Dev. and Bat., 68, and *Tredwell* v. *Reddick*, 1 Ired., 56, cited and approved.

Appeal from the Superior Court of Law of GUILFORD County, at the Spring Term, 1850, his Honor, Judge *Battle*, presiding.

The following is the case sent up from the Court below:

This was an action of trespass *quare clausum fregit*, to which the defendants pleaded not guilty.

The plaintiff relied upon both an actual and constructive possession of the *locus in quo*, at the time when the trespass was alleged to have been committed. To show a constructive possession, founded on title, he produced a grant to John Talbot, dated in 1847, and a deed from Talbot to George Mendenhall, dated in 1793. He then produced the deed from one Robert Stewart to Eli Pugh,

dated Nov. 14th, 1830, a deed from the said Pugh to John Horney, dated Nov. 11th, 1834, a deed from said Horney to Jeffrey Horney, dated Sept., 1835, and a deed from said Horney to John Lamb, dated Sept., 1840, and then a deed from the said Lamb to the plaintiff, dated 25th April, 1843, all of which included the *locus in quo*. It was testified that the land, included in the deed to Stewart, was open forest, no part of which was in cultivation, but he and the successive proprietors after him occasionally cut rails upon it for the use of other plantations. It was stated that Jeffrey Horney cut rails upon it every year, while he owned it, and hauled them off to a plantation, which he cultivated about three miles distant. It was stated, further, that Lamb built a house upon the land in April or May, 1839. The deed from Lamb to the plaintiff conveyed a small half acre lot, situated in the town or hamlet of Florence, upon which was an unfinished house, built, by William Patterson, a son of the plaintiff. It was then shown that the defendants moved this house from the lot in March, 1846 : and it was for this that the action was brought, the writ having been issued the 17th June, 1846.

To show an actual possession the plaintiff introduced a witness, who testified, that, immediately after the plaintiff's purchase, he went and nailed boards across the space inetended for a chimney and windows, which were open, and put some empty boxes and barrels in the house.

The defendants contended, that the plaintiff had shown no such title as gave him a constructive possession of the house and lot in question : and that, at the time when the house was removed, it was in the actual possession of them or one of them, and therefore the action could not be sustained. To prove this possession, they called as a witness one Thomas Barnum, who testified that the defendant Bodenhammer came to his residence in Westminster and

requested him to go and see him take possession of the house in question; that he went and saw the said defendant tear off the boards, which the plaintiff had nailed across the windows and put out the plaintiff's boxes and barrels, and agreed with the defendant Dillon, by parol, that he might have the house for twelve months at six pence per month, each party being at liberty to put an end to the lease by giving the other notice. This was in May, 1844. Another witness testified, that the defendants Dillon and White had some timber and a wagon in the house, and that a man, named Beard, also kept a wagon in it, being kept open; and that it was used for no other purpose than as a repository for such things.

The defendants offered in evidence a paper for the purpose of showing that William Patterson had an interest in the house and lot, which was liable to be sold for the payment of his debts, and also for the purpose of showing that upon William Patterson's failing to comply with his contract, the defendant Dillon, who had bought from Lamb the residue of the tract of land, was entitled to take possession of the *locus in quo*, but it being admitted that William Patterson had failed to comply with the terms of his contract, and that the defendant Dillon had no deed covering the house and lot in question, the court rejected it, holding that it was immaterial, as they had already been permitted to show themselves, as far as they could, to have been in the actual possession of the house at the time of its removal.

The court was opinion and so charged the jury, that the plaintiff had not shown a complete title, so as to give him a constructive possession, but that, if the evidence were believed, he had shown an actual possession, against which the defendants had proved nothing to prevent his recovering in this action. The plaintiff had a verdict, whereupon the defendants moved for a new trial for the

rejection of testimony and for misdirection in the charge, which motion was overruled, and a judgment given, from which the defendants appealed.

Kerr, for the plaintiff.

G. C. Mendenhall, for the defendants, submitted the following argument:

7 Comyns Digest, 492 and '3, to show *actual possession* is necessary to sustain trespass. 9 Johnsons Rep., 61, *Stuyvesant* v. *Tompkins*, see caption and first part of Court's opinion as to *lawful* as well as *actual* possession necessary. 1 T. Rep., 426; *Stotts* v. *Booth*, BULLER, J., top page, 227; N. C. Term Rep., 108; *Sheppard* v. *Sheppard*, this to show a possession short of 7 years, will not allow a plaintiff to recover in ejectment; see caption and Daniel's opinion. 2 Car. L. Rep., 89, *McMillan* v. *Haffley*, see whole of Cameron's opinion as to actual possession necessary to sustain the action of trespass to land. 4 Dev. Rep., 232, *Graham* v. *Houston*, see caption and last page of Ruffin's opinion, top 234, to show cutting trees is no disseisin. 4 Dev. & Bat., 164, *Ring* v. *King*, to shew plaintiff cannot sustain trespass without actual possession, and this must mean *lawful* possession—last half of GASTON's opinion, 168, top. 4 Dev., 158, *Green* v. *Horman*, see page 161, nearly all this page to show cutting trees not good or cultivation necessary, see also bottom of page 162 to show every man should know his own boundary. 12 Johnson's Reports, 193, *Wick* v. *Freeman*, to show an actual re-entry is necessary or actual title in the plaintiff; read the whole case. 6 Bac. Abr., 566, (3 clauses left and 2 right.)

NASH, J. The judgment in this case must be reversed. The plaintiff has shown neither an actual or constructive possession of the premises in question. To avail himself of the latter, he must prove the legal title in himself at

the time the alleged trespass was committed. In this he has not succeeded, and the jury were so instructed by his Honor, who tried the cause. It is however, in the second branch of the charge, that the error lies, of which the defendants complain. After informing the jury that the legal title was not in the plaintiff, the charge proceeds, "that if the evidence is believed, the plaintiff had shewn an actual possession, against which the defendants had proved nothing to prevent his recovery in this action." We do not concur with his Honor. At the time that Lamb, who claimed title to the premises, conveyed to the plaintiff in 1843, there was on them an unfinished house. The plaintiff put into it some empty barrels and boxes and nailed plank over the spaces left in the walls, for a window and fire place. This was the only possession he ever had, as far as the case discloses. A year after, in May, 1844, the defendant Bodenhammer pulled off these boards and threw out the articles put there by the plaintiff, and leased the house for twelve months to one of the other defendants, who put into it some wagon timber. In this condition the premises remained, until March, 1846, when the house was removed by the defendants; and the case states, that this removal constituted the trespass, for which the action was brought. It is very clear it cannot be sustained. Whatever possession the plaintiff may have acquired by putting into an unfinished house, which had never been inhabited by him or any other person, some empty barrels and boxes, and nailing on the boards, as set forth in the case, was lost to him by the acts of Bodenhammer of a similar character. If they were sufficient to give Patterson the actual possession, similar acts on the part of the defendant were sufficient to divest him of it, and place the actual possession in the latter. The acts were of the same character and must carry with them the same effects. Two years after Bodenhammer had dispossessed the plaintiff, and while his

possession, so acquired, continued, the house was removed. To enable the plaintiff to maintain an action for the removing of the house, he ought to have re-entered before the house was removed and thereby revert the possession in himself. The action of *quare clausum fregit*, is a remedy for an injury to the possession; *Dodds* v. *Gullidge*, 4 Dev. and Bat., 68, and therefore cannot be maintained by one who has it not. *Tredwell* v. *Reddick*, 1 Ired., 56.

His Honor erred in directing the jury, that at the time the house was removed, Patterson, the plaintiff, was in the actual possession of it, and could maintain his action.

PER CURIAM. Judgment reversed and a *venire de novo* ordered.

B. T. DAVIS, et al. v. SAMUEL HILL, et al.

When a petition is filed to discontinue an old road between certain points and establish a new one between the same points, and the petition is opposed, and the court, upon the hearing, refuse to discontinue the old road and establish the new road as prayed for, but direct another road to be opened, passing over only a part of the route prayed for by the petitioners; *Held*, that the defendants were entitled to recover their costs.

Appeal from the Superior Court of Law of RANDOLPH County, at the Spring Term, 1850, his Honor, Judge *Battle*, presiding.

No counsel for the plaintiffs.

Mendenhall, for the defendants.

PEARSON, J. The plaintiffs in their petition allege, that the public convenience would be promoted by making a new road from Cunnignham's old place, to a fork near William Bingham's plantation, running by Davis' tanyard, John Hammond's and on by Ferguson's smith-shop; and by discontinuing the old road between those two points. The prayer is that a new road be established between the two points, passing by the places designated, and that the old road be discontinued. The defendants object to the change in the road. They oppose the new road and insist that the old road should not be discontinued.

The county court ordered the new road to be laid off and the old road to be discontinued. The defendants appealed and the superior court refused to establish the new road or to discontinue the old road, but it was ordered that a new road be laid off from Ferguson's smith-shop, to the fork near William Bingham's plantation, and it was further ordered that the defendants pay the costs, from which latter order they appealed.

The defendants were certainly left "in possession of the field of battle," and we are at a loss to see upon what ground they were required to pay the costs. Whether under this proceeding, the court had the right to establish the road, which is ordered to be laid off, is not submitted to us; as the appeal is only from the judgment as to the costs. But it might well have been questioned. There was no petition in writing, setting forth that such a road would promote the convenience of the public, and no notice was given that application would be made for it; so that although there was proof of its utility, it was "*probata*" *sed non* "*allegata.*" An application for a road, from one point to another, does not include a road from one of the points to any intermediate point: for grant that the road, if laid out the whole distance, would be useful, *non constat*, that, if it stopped half way, it would be of any manner of use: in general it would not. A fence

enclosing the whole field would protect the crop, but if it stops half way, it is of no use. In this case it only appears incidentally, that there is a road to Fayetteville, which passes by Ferguson's smith-shop, into which the new road will lead.

Waiving this question, the controversy was, shall the old road be discontinued between certain points and a new road made in its stead. This was decided in favor of the defendants and they were entitled to recover their costs. There is a plain distinction between an application for a road and an ordinary action at law, in which the plaintiff seeks to recover the whole and *every part* of his demand, for a road is an *entire thing*. If the petitioners, in the event that the whole is not established, desire that it be established to an intermediate point, this should be set forth in the petition, and then it would appear, whether the defendants opposed *the part* as well as the whole. In this case, it does not appear that the *defendants made any objection* to *the road which his Honor ordered be laid out*, and it can make no difference, that this road happened to pass over a part of the ground, over which the road applied for was to run. It is true, "the whole includes all of its parts," but that supposes that the whole has an existence: here "the whole" was refused, and it is an obvious fallacy, to say, in reference to this question, that the road, established by the superior court, is a part of the road which the petitioners applied for.

PER CURIAM. The judgment below must be reversed and the defendants must have judgment for their costs.

GROVES M. BRAZIER v. JAMES ANSLEY.

To sustain the action of trover, the right of property in the thing claimed and of possesion, at the time of the alleged conversion, must be vested in the plaintiff.

A cropper has no such interest in the crop, as can be subjebted to the payment of his debts; while it remains in mass, until a division, the whole is the property of the landlord.

The doctrine of appropriation, as constituting a delivery and thereby passing the title to the purchaser, arises in cases of a sale of goods generally, as distinguished from the sale of a specific chattel. And when a less quantity, out of a larger, is the subject of the contract, then no property passes to the purchaser until a delivery; for until then the goods sold are not ascertained.

The vendor may appropriate the quantity purchased by separating it from the the bulk: but the appropriation is not complete until the vendee assents to take the separated portion.

The cases of the *State* v. *Jones*, 2 Dev. and Bat., 544; *Hare* v. *Pearson*, 4 Ired., 77 and *Lewis* v. *Mooay*, 4 Dev. and Bat., 323, cited and approved.

Appeal from the Superior Court of Law of CHATHAM County, at the Spring Term, 1850, his Honor, Judge *Battle*, presiding.

The following is the case sent up from the court below:

This was an action of trover for a parcel of corn. Plea, not guilty.

On the trial the plaintiff introduced a witness named Brown, who testified, that, during the year 1845, he worked with the defendant on a farm of the latter and was to have a fourth part of the corn made upon it for his services; that before the corn was gathered, he sold his interest in it to the plaintiff for $40; that wishing to leave the farm, the plaintiff sent some hands to assist in gath-

cring the crop, but the defendant objected to the arrangement, whereupon it was agreed between the plaintiff and defendant, that the latter should gather the crop, for doing which he was to have five barrels of corn, and that he would notify the plaintiff at each division. Upon cross examination the witness stated that he became indebted to the defendant for some articles furnished him during the year, and that he agreed to pay the defendant when he sold his corn. Another witness, Mr. Marks, was then called and stated, that, some time in the fall of 1845, he was called upon to see the corn measured, that both the plaintiff and the defendant were present, when the latter measured the corn by putting three-fourths of it in one heap and the remaining fourth in another, and that he then claimed to take five barrels and a sufficiency to pay Brown's account from the smaller heap, to which the plaintiff objected, saying, that the five barrels ought to be taken from the whole quantity before division, and that there was no claim upon it for Brown's account. The parties disputed for some time about this matter, when the plaintiff went off, saying, he would have nothing more to do with it. The witness stated further, that, if all the defendant claimed had been allowed, there would have remained only a few bushels of corn for the plaintiff, and that there was no final delivery of any part of it to the plaintiff.

The plaintiff having closed his case, the defendant moved that he should be non-suited upon the ground that the action of trover could not be maintained, because no part of the corn had ever vested in the plaintiff, and that there was no demand before suit brought.

The motion was resisted upon the ground, that the defendant was estopped to deny that the plaintiff had acquired Brown's share of the corn, for the reason that he had ratified the contract made by the plaintiff and Brown.

The court being of opinion that the action could not be maintained, the plaintiff submitted to a judgment of nonsuit and appealed.

Haughton, for the plaintiff.

W. H. Haywood, for the defendant.

NASH J. To sustain the action of trover, the right of property in the thing claimed, and of possession at the time of the alleged conversion, must be united in the plaintiff, and he must prove that, while the property was his, the defendant converted it. *Gordon* v. *Harper*, 7th Term, 9; *Harwood* v. *Smith*, 2nd Term, 750; *Lewis* v. *Moody*, 4 Dev. and Bat., 323. In this case it is denied bythe defendaut, that the plaintiff had any title to the corn sued for or that he has converted it. As to the title, the plaintiff urges that the facts proved show that an appropriation was made by the defendant, the landlord, of one-fourth of the crop, to Brown, the cropper, which was a delivery in law, or at any rate the evidence ought to have been left to the jury, under the instruction of the court. A full and complete answer is furnished by the case to each position of the plaintiff. It is a well settled principle of law, in this state, that a cropper has no such interest in the crop, as can be subjected to the payment of his debts, while it remains *en masse*. Until a division the whole is the property of the landlord. *State* v. *Jones*, 2 Dev. and Bat., 544. *Hare* v. *Pearson*, 4 Ired., 77. The defendant was the owner of the land, on which the corn was raised, and a man by the name of Brown cropped with him. The latter transferred his interest to the plaintiff for a valuable consideration. After the corn was matured, it was agreed between the plaintiff and the defendant, that the latter should gather the corn, and for so doing, should have five barrels. The corn was gathered by the defendant, and placed by him in two seperate heaps or piles one containing three-fourths and the other one-fourth. From

this pile the defendant claimed to take his five barrels for gathering. To this the plaintiff objected, alleging they ought to come out of the whole crop. With this dispute we have nothing to do, as it regards the proper construction of the previous agreement. It is sufficient for our present enquiry, that a controversy did arise, and that the plaintiff would not agree to the construction put upon it by the defendant. The case states that the plaintiff "went off, saying he w uld have nothing more to do with it." Brown, the cropper, was present, but in no way interfered, and what afterwards became of the corn we are not informed, except that it is stated in the case, that no part of the corn was finally delivered to the plaintiff. There certainly was here no appropriation by the landlord of any specific portion of the crop to the use of Brown or the plaintiff, and therefore there was no delivery to the latter. The doctrine of appropriation, as constituting a delivery and thereby passing the title to the purchaser, arises in cases of a sale of goods generally, as distinguished from the sale of a specific chattel. And where a less quantity, out of a larger, is the subject of the contract, there no property passes to the purchaser until a delivery, for until then the goods sold are not ascertained. To constitute a delivery in such cases, the vendor may appropriate the quantity purchased, by separating it from the bulk. But the appropriation is not complete, until the vendee assents to take the separated portion; his assent is equivalent to accepting possession under the contract. 1st Chap. on Cont., 375. In a case like this, which in principle is similar to that of a sale of a lesser part out of a larger, the appropriation by the landlord was incomplete, until ratified by the cropper or his agent and vendee, the plaintiff. It would be manifestly unjust to suffer the landlord to be the sole judge of the rights of his cropper. Not only was the assen tof the plaintiff withheld, but he positively refused to

receive the corn set apart for him or his principal. The title to the corn never vested in him, and he cannot, under this evidence, support the action of the trover. The cases cited in the argument for the plaintiff abundantly prove that a delivery may be proved, by an appropriation by the vendor, but in none of them is it said, that it is complete without the assent of the vendee.

We agree with his Honor that the action cannot be sustained.

PER CURIAM. Judgment affirmed.

THOMAS BILES v. MOSES L. HOLMES, et al.

Ordinary care, reasonable time and probable cause, the facts being established or proved, are questions of law, to be decided by the court.

The declarations of a slave as to his health, and the condition of his body, are admissible in evidence in an action brought by his master to recover damages for an injury done to him.

The cases of *Herring* v. *Wil. & Ral. R. R. Company*, 10 Ire., 402, and *Swaim* v. *Stafford*, 3 Ire., 293, cited and approved.

This is an action on the case, in which the plaintiff claims damages for an injury to his slave named Green, which has greatly impaired the usefulness, and lessened the value of the said slave. The plaintiff declares in many counts; in one set, he alleges that the injury arose from the negligence of the defendant; in another set, he alleges, that the injury arose from the negligence of the agent of the defendant; in a third set, he alleges, that the injury arose from the want of ordinary care on the part of the defendant; and in a fourth set, he alleges, that the

injury arose from the want of ordinary care of the agent of the defendants, and alleging in each count, that the defendants were the bailees of the plaintiff, the defendants having hired from the plaintiff the said slave, to-wit, at the gold mines of the defendants and were bound to take that care of Green, which an ordinary man would take of his own property. This suit was instituted by Thomas Biles, as plaintiff against Moses L. Holmes, John McCoffin, and others, as defendants. The plaintiff introduced John Cauble as a witness, who proved that the defendants had hired from the plaintiff his slave Green, to work at the mine of the defendants at Gold Hill; that he, Green, had been put to work at the bottom of a shaft about one hundred and eighty feet deep, from which the defendants were taking gold ore; that buckets about three feet deep, each capable of holding sixty gallons, were alternately let down and drawn up, as the one was ascending, the other was descending, being used to bring up either ore or water to the surface of the earth; that the witness was in the service of the defendants and was employed as their "lander" at the mouth of the shaft, it being his duty to receive and unload the ascending buckets and to fix and let down the descending buckets; and to put in the descending buckets whatever was to be sent down the shaft; that these buckets were used to bring up water and ore; that in the bottom of the buckets was an aperture four inches square, over which was a valve six or eight inches square, and fastened at one end to the bottom of the bucket, which valve being raised at the other end when the bucket was brought up and landed, the water escaped; that when these buckets were used to bring up ore, or to carry down implements to work with, the aperture was closed with a wooden plug nailed in from the outside, and as a further security against anything falling through the bottom of the bucket, the valve was nailed down over the aperture on the inside; that without the

valve on the inside, or iron hoops on the bottom, securing the plug in the aperture, the buckets are not safe, and are not in a condition to be used with safety to those who are working at the lower extremity of the shaft; that, about nine o'clock in the morning, on the 28th January, 1848, as one of the buckets commenced descending, the witness, who was the "*lander*" of the defendants, dropped into it four iron drills, each weighing five pounds, which instantly passed through the aperture in the bucket at its bottom and one of them struck Green on the head, and fractured his skull, which made the operation of trepanning necessary, and a large piece of the skull bone was cut out. Green was working at that time at the bottom of the shaft, directly below the bucket. The witness knew that Green and a white man were then working there together: that drills are implements used by miners in getting the ore; that, at the time the drills were put in the bucket, there was no valve in the bucket, and there was no iron hoop or strap at the bottom of the bucket to secure the plug; that the witness had been engaged from twelve o'clock at midnight until nine o'clock the next morning, when Green was injured, the witness being employed during that period as the lander of the defendants, in landing and unloading the buckets, at the mouth of the shaft; and during the said period the witness had not looked into either of the said buckets, or put his hand in either of them, to ascertain if the aperture at the bottom was properly secured.

Another witness was introduced by the plaintiff and was asked, if Green did not complain much of head-ache, when exposed to the sun, and if Green did not state his inability to work in the sun, or to work in any laborious employment. These declarations of the said slave were opposed as evidence in the cause by the counsel for the defendants, and they were excluded by the court.

His Honor charged the jury, that this was a bailment beneficial to both parties, and that, if the defendants had hired the slave Green from the plaintiff, they, the defendants, were bound to take that care of Green, which a prudent man would take of his own property: and if the injury complained of in this case arose from an omission, on the part of the defendants, or their agent, or that care which a prudent man would take of his own property, which was a question for the jury, then the defendants were liable in this action. But if they believed, that the defendants, or their agent, had not omitted on this occasion that care of Green, which a prudent man would take of his own property, then they should find for the defendants. The jury rendered a verdict in favor of the defendants. Rule for new trial. New trial refused and rule discharged. Judgment for the defendants, from which judgment the plaintiff prayed an appeal to the Supreme Court, which was granted.

No counsel for the plaintiff.

Mendenhall, for the defendants.

PEARSON, J. What amounts to "ordinary care" is a question for the court. The judge below erred in leaving it to the jury.

Whether the proof establishes particular facts is for the jury; but what is the legal effect of these facts, supposing them to exist, is for the court. Accordingly it is settled, that ordinary care, reasonable time, and probable cause, the facts being admitted or proved, are questions of law. *Herring* v. *Wil. & Ral. R. R. Company*, 10 Ire., 402; *Swain* v. *Stafford*, Ire., 293.

If these were not questions of law, no rule could ever be established, and the legal effect of certain facts, like their existence, would in all cases depend on the finding of a jury, with no mode of having its correctness judged of by a higher tribunal.

Had the jury come to a correct conclusion, the error of the judge in submitting the question to them, instead of deciding it himself, would have been immaterial; but, taking the evidence to be true, there was manifestly a want of ordinary care. A large bucket, with a hole four inches square in the bottom, the fastenings of which were liable to be knocked off, is used nine hours without any examination and as the bucket commenced descending, four pieces of iron, weighing five pounds each, are *dropped* into it, without looking to see, as might have been detected by a mere glance, that the fastenings were off and the hole open, and this too when the lives of two men were at stake. "Ordinary care" required, that the fastenings should have been examined and the pieces of iron should have been put, not *dropped*, in the bucket cross-ways or in such a manner as to prevent them from falling out or dropping through.

As the case will be tried again, it is proper to notice the question or evidence, as to which his Honor also erred.

The object of the plaintiff was to show the condition of his slave, that he had not recovered from the effect of the blow and was permanently injured. For this purpose it was competent to prove how he acted, how he looked, and of what he complained. In fact this is almost the only kind of evidence by which the condition of body or mind can be ascertained; it is natural evidence or the evidence of facts, as distinguished from personal evidence or the testimony of witnesses. *Best, on the principles of evidence.*

The declarations of a patient to his physician are strong evidence of the state of his health, and only differ from his declarations to a third person, because it is less probable that he will feign or state falsehoods to one, by whom he hopes to be relieved; but this consideration only affects the degree of credit due to such declarations and does not affect their admissibility. Whether express-

ions of pain are real or feigned, must be determined by the jury. 1 Greenleaf Ev., 126.

If it be material to ascertain the mental condition of an individual, his conversation at different times is admissible. Upon the same ground, it being material to ascertain the bodily condition of the slave, his complaints of headache, when exposed to the sun, and his declarations that he was unable to work in the sun, or to endure hard labor, are admissible. True, one may feign the language of a mad-man, or may utter false complaints of pain, but the law does not on this account exclude what may be the only mode of proof. It is left to the good sense of the jury, connecting the declarations with the acts and looks of the party and other circumstances, to say how far such evidence is to be relied on.

The statute, excluding the testimony of a slave or free person of color against a white man, has no application. The distinction between natural evidence and personal evidence or the testimony of witnesses, is clear and palpable. The actions, looks and barking of a dog are admissible as material evidence, upon a question as to his madness. So the squealing and grunts or other expressions of pain, made by a hog, are admissible upon a question as to the extent of an injury inflicted on him, This can in no sense be called the testimony of the dog or the hog. The only advantage of this natural evidence, when furnished by brutes, over the same kind of evidence, when furnished by human beings, whether white or black, is that the latter having intelligence, may possibly have a motive for dissimulation, whereas brutes have not; but the character of the evidence is the same and the jury must pass upon its credit.

PER CURIAM. There must be a *venire de novo*.

LUKE CARTER v. JAMES WOOD.

Where a person sued *in forma pauperis*, and recovered a verdict, but the judgment was for the amount of the verdict only, and not for the costs, he cannot afterwards, upon a rule, have an order that execution shall issue against the defendant for his costs.

While a suit is in progress, the witnesses have a right to demand from the party, at whose instance they are summoned, the payment for their attendance at the end of each term, or as soon as the suit is disposed of. Their claim after judgment is not against the person summoning them, but against the person bound to pay the costs under the judgment, unless the party so bound is insolvent.

The cases of *Clork* v. *Dupree*, 2 Dev., 411; *Office* v. *Lockman*, 1 Dev., 146, and *Standley* v. *Hodges*, Conf. Rep., 413, cited and approved.

Appeal from the Superior Court of Law of ROBESON County, at the Spring Term, 1850, his Honor, Judge *Settle*, presiding.

This was a rule which had been served on the defendant to shew cause why he should not be taxed with the costs of the plaintiff's witnesses, in a case which had been tried between the same parties. The plaintiff had brought an action of trespass *vi et armis*, *in forma pauperis*, against the defendant, in which there was a verdict for the plaintiff and judgment for the amount of the verdict only. Some of the plaintiff's witnesses had drawn their tickets from the office, brought suits on them before a magistrate, after the determination of the original suit, and recovered judgmensts, from which the plaintiff appealed to the superior court, when the witnesses recovered judgment. And the present plaintiff prayed an appeal to the Supreme Court, but being unable to find sureties the cases were not taken up. The plaintiff paid some of

his witnesses, and some of the tickets still remain in the office unsatisfied. The rule being argued at this term, his Honor discharged the rule, on the ground that a plaintiff, who sues *in forma pauperis*, neither pays nor recovers costs.

The plaintiff prayed an appeal to the Supreme Court, which was granted.

Troy, for the plaintiff.
Strange, for the defendant.

NASH, J. We have listened with pleasure to the argument, submitted to us in behalf of the plaintiff. The case does not, however, properly present the question designed to be raised. That a person suing *in forma pauperis*, in general, neither pays nor recovers costs, has been considered the established law of this state, ever since the case of *Clark* v. *Dupree*, 2d Dev., 411. But whether under that rule the attendance of his witnesses is embraced has not been decided. The case before us does not present the point. The plaintiff had been permitted to sue *in forma pauperis* and had recovered a verdict. The case states, that judgment was rendered *only* on the verdict. None was asked for against the defendant, for any costs. The notice is to show cause, why "an execution should not issue against him, the defendant, for the costs of the witnesses in the case." Under the act of 1777, ch. 115, sec. 90, "the party, in whose favor judgment should be given, &c., shall be *entitled* to full costs," &c. To reap the benefit of this provision, the party must have a judgment, not only on the verdict for the sum awarded him by the jury, but also one for his costs. In general, it is a matter of course for such a judgment to be entered, and, if the case had been silent on the matter, we might have presumed that such was the fact here. But we are not permitted to make any such presumption. We are told none such was

asked for and none such rendered. Whether, therefore, the word "costs" in the act of 1836, 31st ch., 47th sec., which is a transcript of the statute of Henry the 8th, embraces the attendance of the plaintiff's witnesses, we do not feel at liberty to decide. In order to have brought the question before the court, a motion for a judgment for those costs ought to have been made to the court, before whom the cause was tried. The case further states, that, after the judgment was rendered, some of the witnesses for the plaintiff warranted him upon their tickets and obtained judgments, which he paid; others he paid without process and some of the tickets are still in the office of the Clerk. The proceedings are had for the purpose of subjecting the defendant to the payment of these several claims, by an execution. In addition to the answer already given, why the court cannot order the execution as required, it may be said, the plaintiff, as far as the case discloses, was not answerable for any of those claims, not because he was suing *in forma pauperis*, but because the original suit was ended. While a suit is in progress, the witnesses of the parties have a right to demand from the party, at whose instance they were summoned, the payment for their attendance at the end of each term, or as soon as the suit is disposed of. If they do not choose so to do, they ought to deposit their tickets at each term in the clerk's office, that they may be regularly taxed in the bill of costs. Their claim, after judgment, is not against the person summoning them, but against the person bound by the judgment to pay the costs under the judgment, unless the party so bound is insolvent. *Office* v. *Lockman*, 1st Dev., 146; *Standley* v. *Hodges*, Conf. Rep., 413. Here, we repeat, there is no judgment for costs. And the judgment of the court below is affirmed and rule discharged.

PER CURIAM. Judgment accordingly.

WALTER F. BURNS v. BENJAMIN ALLEN.

Where A. sold to B. a tract of land, conveyed by a deed containing a covenant for quiet enjoyment, and, upon discovery that a part of the land previously belonged to B., A. offered to pay to B. the value to this part of the land, so as to avoid a suit on the covenant; *Held*, that an action of assumpsit would not lie on this proposition, because B. had not acceded to it.

Appeal from the Superior Court of Law of ANSON County, at Spring, Term 1850, his Honor Judge *Settle*, presiding.

Winston, for the plaintiff.
Strange and *G. C. Mendenhall*, for the defendant.

NASH, J. There is nothing in the case which in the opinion of the Court would justify an interference with the judgment below. The defendant sold to the plaintiff a tract of land for a specific sum of money, and the deed contained a covenant for quiet enjoyment. After the conveyance the land was surveyed according to the metes and bounds contained in it; when it was discovered that it covered twenty two acres of land owned by the plaintiff. This fact was communicated to the defendant by a witness in the case, who was requested by him to tell the plaintiff, he did not wish to be run to any costs, but was willing to pay for the land. To other witnesses he stated, he did not wish Burns to sue him; he would do what was right, he was willing to pay the value of the land. The action is in assumpsit and the declaration contains two counts. The first is on a promise by the befendant, in consideration of forbearance on the part of the plaintiff to sue, to pay the plaintiff the value of the land. The second is on a promise to indemnify the plaintiff for his loss in purchasing

his own land. There is nothing in the case to show that the plaintiff and defendant ever entered into any *agreement*, respecting the land, after the execution of the surveyance; or that, after that time, they ever had any communication on the subject. The case presents simply an offer on the part of the defendant to settle in the way indicated by him, without any action on the part of the plaintiff, acceding to it, and without any evidence to show that it was ever made known to him. Neither count in the declaration is sustained. An assumpsit is a contract, which requires the assent of both the contracting parties. This was a mere offer to make one, which might have been withdrawn by the defendant, at any time before it was accepted by the plaintiff. *Routledge* v. *Grant*, 4 Bing., 653.

PER CURIAM. Judgment affirmed.

SAMUEL LONG v. JOHN BONNER.

An action of assumpsit for the use and occupation of land will not lie in this state, unless there be an express promise to pay rent.

The case of *Hayes* v. *Acre*, Conf. Rep., 19, cited and commented on.

Appeal from the Superior Court of Law of PERQUIMANS County, at the Spring Term, 1850, his Honor, Judge *Ellis*, presiding.

The action is assumpsit for the use and occupation of a piece of land belonging to the plaintiff. Plea, non assumpsit.

On the trial evidence was given, that, in pursuance of a decree of the court of equity in a cause duly constituted, the land was sold in the latter part of December, 1847, by the clerk and master, as belonging to the plaintiff in fee, and the defendant was accepted by the master as the purchaser, and executed bonds for the purchase money, and entered into possession of the premises on the 1st day of January, 1848. In April following it came to the knowledge of the defendant, that the plaintiff was not entitled in fee absolutely, but that there was a limitation over to other persons upon the contingency of the plaintiff's death under 21 and without leaving issue: and upon the ground that the plaintiff was still an infant and had no issue, the defendant then applied to the court of equity to rescind the contract of sale—which was accordingly done. The defendant thereafter continued to occupy the premises for the residue of the year and made a crop thereon. It is for a reasonable satisfaction for the occupation for the year 1848 the action is brought.

The counsel for the defendant moved the court to instruct the jury, that the plaintiff was not entitled to recover, upon the ground, among others, that the action would not lie. But the court refused to give the instruction; and directed the jury, that, even if the defendant were a trespasser, on the land, the plaintiff could waive the trespass, and maintain this action for compensation in the nature of reasonable rent for the use and occupation of the land, and much more when the defendant entered under the plaintiff or under the court, acting for him. From a verdict and judgment against him the defendant appealed.

No counsel for the plaintiff.
Jordan, for the defendant.

RUFFIN, C. J. Undoubtedly it is incorrect to suppose, that this action could be maintained against a trespasser. It would not lie for the hire of a personal thing against a trespasser; but the owner would have to resort to the action of trover or trespass. If, indeed, a trespasser sell the thing, the owner may waive the trespass and affirm the sale and bring assumpsit for the price as money had and received; and so, for money received by the trespasser for hire by him to another person. But for the trespass itself in taking the thing, or for the enjoyment of it by the trespasser, assumpsit will not lie, as no contract, express or implied, exists between the parties. So, with respect to land, if the trespasser let it and receive rents, we will not say, that he would not be liable therefor as money had and received to the use of the owner. But, for the injury of illegally entering into the land of another and keeping him out, the remedy is by action of trespass for the mesne profits after the owner regains the possession. No action *ex contractu* lies, as there is nothing from which a contract can be implied. That, however,

is not material to the present purpose, as this defendant was not a trespasser, but entered under authority of law upon a supposed or intended purchase of the premises. The question is, whether the action of assumpsit will lie under such circumstances; and the opinion of the Court is, that it will not.

There are most respectable authorities, that this action cannot be maintained by a vendor against one who entered and occupied under a contract of purchase, after the contract has been rescinded or abondoned, although it might lie upon a parol lease, not reserving a certain rent. Those decisions go on the ground, that compensation for the use of land is in truth rent, and can only arise where there is the relation of landlord and tenant, and that such relation does not subsist where the contract is for a sale and purchase. Hence, the law leaves the parties to their remedies on that contract, or to provide by proper stipulations for what may be just between them upon their rescinding it. And it is somewhat surprising and to be regretted, that provision was not made for the new state of things, when the defendant was discharged by the court from his purchase, by requiring him to take the land for the year, if the infant's estate should so long continue, at a proper rent. But that point need not be further considered, as it is the opinion of the Court, that in our law assumpsit will not lie for use and occupation of land unless upon an express contract of leasing, and therefore that this plaintiff cannot recover.

It is clear, that at common law it would not lie upon an implied promise, but only an express one. The reason is, that there were higher remedies, namely, debt and distress. *Reade* v. *Johnson*, Co. Eliz., 242; 3 Woodeson's Lectures, 79. Indeed rent due on a parol lease is a specialty debt, in the administrotion of assets. *Gage* v. *Acton*, 1 Salk., 325. This reason has been said to be technical, and that is true. But that is no ground for holding it to be

insufficient for not allowing the action. The question is, whether the law should imply a promise to pay rent, in order thereby merely to give assumpsit as a remedy, when the law had already provided the others just mentioned. It is plain, that no such implication should be made, unless, for the same reason, a promise may also be implied to pay a sum of money, which the party owed, by bond, by lease, by indenture, or by judgment. The reason against the one is as technical as that against the other: for, in truth, it is the same in each case. If, indeed, there be an express contract to pay rent, then it was held, that assumpsit would lie thereon: and, therefore, when the promise laid in the declaration was admitted by demurrer, or confessed in the plea in bar, or appeared upon evidence upon non assumpsit, to have been expressly made, the plaintiff was entitled to judgment, because the promise was collateral and was to be taken as intended to give this additional remedy. *Dartnal* v. *Morgan*, Cro. Jac., 598; *Acton* v. *Symon*, Cro. Car., 414; *Johnson* v. *May*, 3 Leo., 150; *Mason* v. *Beldham*, 3 Mod., 73. In consequence of that state of the law, it was enacted in England, as a part of St. 11, Geo. 2., C. 19, that, where the agreement is not by deed, the landlord may recover in an action on the case for use and occupation. Since that time the action is common in that country, as founded on the statute. Before it, no instance is found in which it was sustained upon an implied promise. That act is not in force in this state. It is probable it may have been in use formerly or deemed to have been in force here; as it is stated by Judge TAYLOR, in *Hayes* v. *Acre*, Conf. Rep., 19, that recoveries had been made in our courts upon implied promises, and, as we have seen, there was no other ground for them. In that case the plaintiff had judgment: but the report is very unsatisfactory, as the whole record was not here, and it does not appear, whether the plea was non assumpsit, or some other bar, or whether, if the

former, an express promise was proved, or whether the point arose on a motion in arrest of judgment. It is possible, indeed, that Judge TAYLOR's opinion was, that a promise might be implied and the action lie on it, as he says that it did not appear from the verdict, whether the action was founded on an express or implied promise, and, consequently, he must be supposed to have thought the plaintiff entitled to judgment in either case. But in both positions, it is apparent, that he was mistaken. For, after a verdict or upon demurrer, every promise laid in the declaration is necessarily taken to be express; and the objection, that one could not be implied, could only arise upon the evidence on non assumpsit, or upon a special verdict, as in *Reade* v. *Johnson*, that there was no special promise, but a leasing for years at a certain rent. In *Hayes* v. *Acre*, therefore, the Court was obliged, in the state of the record, to regard the promise as express; and it may be, that the other Judges rested their opinions on that. Judge TAYLOR was mistaken likewise in supposing that *Mason* v. *Beldam*, which he cited, was an authority, that this action was maintainable at common law upon an implied promise for rent; for the promise was, of course, laid in the declaration as express, and the defendant demurred, and thereby admitted it as laid. In such a case the Court said, in *Johnson* v. *May*, an express promise shall be intended, and not a bare promise in law.

Under such circumstances the Court finds itself wholly unable to sustain this action. It was denied by the common law, and we cannot undertake to give a remedy at common law, which is directly against that law. As far as it ever prevailed here—and that, as far as we have experience, must have been to a very limited extent—it probably proceeded upon some notion, that the act of George 2nd authorised it here. If so, that ground entirely fails at present; because by the Act of 18'6, Rev. St., ch. 1, sec. 2, all the English statutes not then re-enacted,

though in use here before, were repealed. It is to be regretted that the act of George 2nd was not enacted here, as it is a beneficial law. But it was not, and the case is, therefore, at common law, and the action does not lie.

PER CURIAM. Judgment reversed and *venire de novo.*

THE STATE v. WILLIAMSON HAITHCOCK.

A free person of color is chargeable with the support of a bastard child begotten by him on a white woman.

Appeal from the Superior Court of Law of ORANGE County, at the Spring Term, 1850, his Honor, Judge *Battle*, presiding.

Attorney General, for the plaintiff.
No counsel for the defendant.

PEARSON, J. The defendant, who is admitted to be a free negro, was charged by a white woman with being the father of her bastard child. His counsel moved to quash the proceedings upon the ground, that the bastardy laws did not apply to such a case. His Honor very properly overruled the motion.

We are at a loss to conceive of any reason, why the defendant should be exempted from the operation of the bastardy laws, merely because he is a free negro.

Free negroes are capable of holding property, they can sue and be sued, and are bound to support their bastard children, whether begotten upon a free white woman or free black woman. They can set up no "exclusive privilege" in this behalf. The counties ought not to be charged with the support of these bastards; until it is judicially ascertained, by exhausting the legal remedy, that the putative father is unable to do so.

The judgment below must be affirmed. Judgment against the defendant for the costs of this Court and a procedendo issued to the superior court.

PER CURIAM. Judgment accordingly.

THE STATE v. ALFRED SMITH.

Where on an indictment, the defendant pleads a former conviction, it is competent for him, to prove by one, who was not a witness on the former trial, what a witness, who was examined on behalf of the state on that trial, deposed to, though that witness was still alive and within the jurisdiction of the court, in order to shew the identity of the cases.

The case of the *Governor* v. *Roberts*, 2 Hawks, 26, cited and approved.

Appeal from the Superior Court of Law of COLUMBUS County, at the Fall Term, 1849, his Honor, Judge *Dick*, presiding.

This was an indictment for assault and battery on one John Penny. The defendant pleaded not guilty and former conviction for the same offence. The state proved that the defendant struck one John Penny with a stick in the connty of Columbus, within two years before the finding of the bill. The defendant then offered in evidence

the records of the court of pleas and quarter sessions for Columbus county, from which it appeard that a bill of indictment was found against the defendant, at August Term, 1849, charging him with an assault and battery on one John Penny, and, at the same Term, the defendant came into court and submitted and was fined by the court, all of which appears by the records of said court. The defendant alleged, that one James C. Pearce was examined as a witness on the part of the state in the court of pleas and quarter sessions aforesaid, on the submission of the defendant, and the defendant proposed to prove by a witness, what Jas. C. Pearce swore in the county court on said submission, and that what Pearce swore to in the county court would show that it was the same offence. The defendant admitted that Pearce was then living within the county and the jurisdiction of the court and had not been summoned. The court rejected the evidence. The jury found the defendant guilty. The defendant moved for a new trial, because the court had rejected the evidence aforesaid: which was refused and judgment pronounced on the defendant, from which judgment the defendant prayed for and obtained an appeal to the Supreme Court.

Attorney General, for the State.
D. Reid, for the defendant.

NASH, J. The defendant is indicted for an assault and battery. He pleaded a former conviction for the same offence. To sustain his plea, he gave in evidence, the record of an indictment against him, in the court of pleas and quarter sessions of Columbus county, for an assault and battery upon the same person, who is the prosecutor in this case. The record showed a submission on the part of the defendant, and a judgment of the court. To establish the fact that the assault and battery, for which he was

then tried and punished, was the same for which he is now prosecuted, he called a witness to prove, what a man, by the name of Pearce, who was a witness in that case, had sworn to and that it would show the offence to be the same. It was admitted that Pearce was alive and in the county. This evidence was rejected by the court. We are not informed upon what ground it was ruled out. If therefore, a wrong reason should be suggested, our excuse must be, the want of such information. We presume his Honor, who tried the cause, was led into error, by applying to the testimony the general rule, that the best evidence the nature of the case admits is always required. Such is the general rule and the reason upon which it is founded will show its improper application here. The law does not require the strongest possible of the fact in controversy, but that no evidence shall be admitted, which, from the nature of the thing, supposes still greater evidence to be in the parties' power to produce; for the reason that it carries with it a presumption, contrary to the intention, for which it is produced. For it is a natural conclusion, that a man will not rely on secondary evidence, having at his command that which is primary, if the latter will serve his purpose. In this case the evidence excluded was not secondary, but primary, of the same grade as that which could have been given by Pearce, the witness on the original trial. The general rule does not exclude evidence, merely because it is not all that might be produced, or the most satisfactory. The best application of this rule, that I have met with, is furnished by a decision of this Court in the case ot *Governor* v. *Roberts*, 2nd Hawk, 26. The Secretary of State was called as a witness to produce certain papers belonging to the office of the Comptroller. The latter was absent on a journey, and before he left, deposited the key of his office with the Secretary, requesting him to attend to his office while he was absent, and answer any calls. The Comptroller had

not been summoned, and the Secretary testified that he attended, as his agent or on his behalf, with the papers. It was held that although the testimony of the Comptroller would be more satisfactory than that of the Secretary, yet both being oral, were of the same grade, and therefore the testimony offered was competent. The enquiry here was not whether the testimony of Pearce would be more satisfactory to the jury than that of the witness tendered, but whether that of the latter was of an inferior grade. As in Roberts' case, the testimony from either witness was oral and of the same grade and his Honor erred in rejecting the witness offered. 3d Stark. Ev., 391; *Liebman* v. *Pool*, 1st Stark. Rep., 467.

PER CURIAM Judgment is reversed and *venire de novo* ordered.

HENRY COOKE v. WILLIAM BEALE.

Where a guardian to an infant, appointed by a county court in this state removes to another state, taking with him a part of the property of the infant. the court which made the appointment has the right to remove him, without notice, and appoint another in his place.

Appeal from the Superior Court of Law of HERTFORD County, at the Spring Term, 1850, his Honor, Judge *Ellis*, presiding.

W. N. H. Smith, for the plaintiff.
Bragg, for the defendant.

NASH, J. The plaintiff had, by the county court of Hertford, been appointed guardian of some minor children. Subsequently he removed into Virginia, near the line, and took with him a part of the slaves belonging to his wards, and kept them in his own service and hired out the remainder in this state, and duly made his returns to court. Upon these facts and without any notice to the plaintiff, the county court of Hertford removed him from his guardianship and appointed the defendant in his place. This was at the November Term, 1848. The order of the removal is in the following terms: "It appearing to the court that Henry Cooke, guardian, &c., hath removed out of the state, and, without the order of this court certain slaves the property of his said wards, on motion it is ordered by the court, that said Henry Cooke be removed from his said guardianship." At the same term the defendant, Beale, was appointed and gave the necessary bonds. An application was subsequently made by Cooke, the plaintiff, to remove Beale, the defendant, upon the ground that the former had been improperly removed, and to appoint him, Cooke, which was accordingly done. Beale appealed to the superior court, where the order of the county court was affirmed and the defendant appealed to this Court.

The power of the county courts within this state, in appointing and removing the guardians of minor children within their respective counties, is full and complete, under t e act of 1836, ch. 54, sec. 2 and 18. By the latter section, a discretionary power is given to remove, when, in their opinion, the guardian mismanages the estate of his ward. This power, however, is not without its limits and bounds—it is not an arbitrary one, to be used to the oppression and wrong of the citizen, but to be used for the protection of minors and their estates. This Court has no right to interfere in the exercise of a purely discretionary power by an inferior tribunal, unless brought under review

by an appeal. But, when it appears from the record, that they have committed an error in law and exercised a power not granted to them, the court will interfere and correct the evil. In the act of 1836 there is no express limitation of the power of the county court, but a limitation necessarily arises out of the nature of the appointment, and the duties to be performed by the court, in seeing that justice is done to the minors. By the 2nd Sec. the power to appoint is given and also the right "to take cognizance of all matters concerning orphans and their estates." Various regulations are made, as to the manner in which guardians shall manage the estates of their wards, renew their bonds, and make their annual settlements. And all these regulations it is the duty of the court to enforce. This obligation implies, that the person appointed should be, at the time of his appointment, within the control of the court, that is within the reach of its process. For, by the 7th Sec. it is made the duty of the clerk of the court in which the appointment is made, to issue *scire facias*, a notice to every guardian, who neglects to renew his bond, as required by law, "*in whatsoever county he may reside*," &c. If the court may appoint an individual a guardian, who is not a resident of the state, how will it be in their power to discharge their duties, or see that he executes his? If after making the appointment they leave the state, where is the limit? A man living in Vermont or Minnesota would be as legally eligible, as one residing in Virginia, South Carolina, or Georgia. From the nature of the trust, then, we conclude, that a just construction of the act of 1836 requires that a person appointed to the guardianship of an orphan must be a resident of the State. When Mr. Cooke was appointed he did reside within the state, and it was therefore a proper appointment. But the same reasons, which require a residence to receive, requires a residence to continue, the guardianship. And in remov-

ing him the court was performing a duty and obeying the law. The only objection is that no notice was given to him. Was that requisite? We think not. We are of opinion that by the very act of removing, with a view to a permanent residence out of the state, he waived the necessity of a notice and authorized the court to act without it. If in such case a formal notice was necessary, much injury might result to the orphans. The act of 1836 evidently proceeds upon the ground, that cases might occur, requiring prompt action on the part of the court. By the 18th Sec., they are authorized to act upon their own information as well as upon the information of others. And when, as in this case, the fact upon which the conclusion of law is bottomed, is not controverted, but admitted, the necessity of a notice is taken away. But Mr. Cooke not only removed himself but took with him a part of the slaves of his wards. Now if a part, he might carry the whole, and if he could carry the slaves to Virginia, he could carry them to Ohio or Indiana or anywhere else, where slavery is not permitted. It is no answer to say, that he has given bond for the security of the property, and that his sureties will have to make good any loss the wards may sustain. So they are, and equally so are they bound, if he does not make his annual returns, or renew his bonds, or in any manner mismanages the estate; yet for all or any of these omissions on his part, the court may remove him. But further, it is the duty of the court to see that the property itself is safe, and that it shall not be carried beyond their jurisdiction. The court then acted right in removing Mr. Cooke from the guardianship, and, of course, were at liberty to appoint Mr. Beale or any other person, who in their opinion was qualified to receive it. The object of the action of the court, under the proceedings we are now considering, is to declare the appointment of Mr. Beale to the guardianship to be void, because there was already a regular guardian—

in other words, to declare Mr. Cooke still the guardian. We have already said the appointment of Mr. Beale was not void but legal. Upon the order of the county court repealing the order appointing the defendant guardian, he appealed, and his Honor, before whom it was heard, held and so adjudged, that the order removing Cooke from the guardianship was not void, for want of notice to him, but that he had been removed without sufficient cause. Where a party has right of appeal and exercises it, the appellate court is at liberty and is bound to look to all the circumstances contained in the case, and here, we are of opinion, there was sufficient ground for removing Cooke. It follows that the appointment of Beale was proper, as it is admitted he was a suitable person to be appointed.

There was error in the judgment of the superior court, which is therefore reversed and judgment rendered for the defendant Beale.

RUFFIN, C. J. It is unnecessary to consider, whether there was any irregularity in the order removing Cooke from the guardianship of the infants, for the want of notice to him or any other reason: inasmuch as such irregularity, if there were any, is immaterial to the case as it now exists. Upon the subsequent motion of Cooke, in the county court, to rescind the first order, by which he was removed and Beale appointed, both of those persons were before the court, and it was then competent to hear the whole matter upon its merits, and it was so heard. The decision was in favor of the motion and removed Beale and restored Cooke to the guardianship, notwithstanding he, Cooke, then resided in Virginia. From that decision Beale appealed, as he was entitled to do, by the express provision of the Act of 1777; and on hearing the parties on the merits in the superior court, although it was not alleged that Beale was not a good guardian and a fit person for the office, his Honor held, that Cooke also

was a suitable person therefor, and that, for the quiet and security of the infants, it was expedient to remove Beale and re-appoint Cooke as the guardian; and he made the order accordingly, from which Beale again appealed. As the case stands at present, then, the question is simply, which of these two persons the interests of the infants require to be appointed their guardian? Upon that the court cannot doubt: for, however well qualified for the office one may otherwise be, it is a conclusive objection to his appointment, that he is not a citizen of this state, but an inhabitant and citizen of another state. In like manner, his removal from this state, after having been appointed a guardian, raises an equally strong objection to continuing him in the office, and is a good cause for taking it from him and giving it to another. A guardian ought always to be amenable to the process of the court, by which he is appointed, in order that proper and prompt enquiry may be made whether he is taking due care of the infants, their education, and estate; and, when Cooke changed his domicil from this state to another, the court was bound to remove him for that cause, and for that alone, if there were no other. The orders in the superior court must therefore be reversed, and the case remanded with directions to reverse the order of the county court, from which Beale appealed, and to issue a *procedendo* to the county court to refuse the motion of Cooke and to let the appointment of Beale stand.

PER CURIAM. Ordered accordingly.

DEN ON THE DEMISE OF WILLIAM W. PRICE v. JOHN HUNT, et al.

On a separate judgment against one partner for a partnership debt, only the interest of that partner, in any portion of the partnership property, can be sold by execution.

Appeal from the Superior Court of Law of GUILFORD County, at the Spring Term, 1850, his Honor, Judge *Battle*, presiding.

Morehead, for the plaintiffs.
Iredell, for the defendants.

NASH, J. The case is as follows: John H. Bennett and Stephen R. Neil were partners in trade and as such owned the land in dispute. Bennett lived in Guilford in this state, where their business was carried on. Neil lived in Virginia. The firm owed a debt, secured by note executed by both the parties, and an action was brought upon it against Bennett alone, a judgment obtained, and at the execution and sale the defendants became the purchasers. The sheriff conveyed to them the whole tract, and their deed was duly proved and registered. After this, another creditor of the firm sued Neil, the other partner, by attachment, which was levied upon his interest in the same tract of land, obtained his judgment and at the sale of the sheriff under an execution duly issued, the plaintiff became the purchaser and the sheriff made him a conveyance for the land. The action is brought by the plaintiff

to recover his share of the land. Upon the case agreed, his Honor below was of opinion the plaintiff could not recover and rendered judgment for the defendant.

In the opinion of his Honor we do not concur. The only question presented is, what interest did the defendants acquire by their purchase? Did they thereby acquire the legal title to the whole tract, or only the interest of the partner Bennett? If the former, then very clearly the judgment below was right, and the plaintiff could not recover. If the latter, then the plaintiff was entitled to his judgment. The land in question was partnership property, held by the partners Bennett and Neil, not as tenants in common, but as joint tenants. *Baird* v. *Baird's heirs*, 1st Dev. and Bat. Eq., 538. When a judgment was obtained against one of a firm, it was for a long time doubted how the sheriff should proceed; whether he could take the property of the firm, or not. It is now settled that the sheriff may seize and sell the *interest* of the debtor against whom the execution is sued. What that interest is or may be, it is, in many cases, impossible to ascertain, until a final adjustment of all the partnership concerns. The purchaser at such sale must take such interest as the partner had; he could acquire no more. Story on Partnership, Sec. 260, 1, 2, 3. In the case before us, the judgment, under which the defendants claim the land, was against Bennett, and, although the sheriff's deed covers the whole tract, in truth it conveyed to them nothing but the interest Bennett had. The sheriff could seize nothing more, and of course he could sell and convey nothing more. If he could, the purchase would by the sale have acquired what was not in Bennett, either in law or equity. He had only an undivided interest and which could only be divided by first freeing the land from the partnership debts. And the purchaser must take it in the same manner the debtor himself had it, and subject to the rights of the other partner Neil. *Skip* v. *Harwood*, 1st Vy. St., 239. Story on Partnership, 261, in note. It

makes no difference in this case, that the debt was a partnership debt; the judgment was a separate one against Bennett, to which Neil was no party. *Jackey* v. *Butler*, 2nd Ld. Ray. 871. Collier on Partnership, 474. Nothing but the interest of the judgment debtor being sold, that of the other partner, Neil, was subject to a like sale on a judgment against him; and the purchaser under the execution became a tenant in common of the land with the defendants, subject to the equities existing between them, as respectively representing the original partners. With these equities we have now nothing to do. Some stress seems to be laid upon the fact, that, at the time the attachment issued against Neil, Bennett, the other partner, was residing in Guilford county. We do not consider this circumstance as affecting the question. Bennett had no farther interest in the land in question; and though he might have been again sued by every creditor of the firm, they could have no farther redress against the land as to his interest in it. To reach that of Neil it was necessary to sue him: he was in Virginia, but under the attachment he could still be made liable. The only effect of a recovery by the plaintiff in the present action is to admit him into the possession of the land in controversy, as a tenent in common with the defendants.

The judgment below must be reversed and judgment be rendered for the plaintiff.

PER CURIAM. Judgment accordingly.

DEN ON DEM. OF JOHN BANNER, et al. v. JOHN CARR.

In an action of ejectment, where the plaintiff declares, in a single count, upon the *joint and several demise* of different persons, he must be nonsuited.

The cases of *Hoyle* v. *Stowe*, 2 Dev., 318, and *Bronson* v. *Paynter*, 4 Dev. & Bat. 393, cited and approved.

Appeal from the Superior Court of Law of STOKES County, at the Spring Term, 1850, his Honor, *Judge Battle*, presiding.

Morehead and *Kerr*, for the plaintiff.
Iredell, for the defendant.

PEARSON, J. This was an action of ejectment.

The declaration has but one count, which alleges that a *joint and several* demise was made on the 11th April, 1845, by John Banner, Nathaniel Moody, John Martin and Fleming Priddy, to the plaintiff, for the term of ten years from them next ensuing, &c. Upon the trial, it appeared, that one of the lessors had no title. Whereupon his Honor intimated the opinion, that the plaintiff could not recover, and a nonsuit was submitted to.

Hoyle, et. al. v. *Stowe*, 2 Dev., 318, which is cited and approved in *Bronson* v. *Paynter*, 4 Dev. and Bat., 393, is in point and fully sustains the opinion of his Honor. It is there held, if one of the lessors in a joint demise has no title, the plaintiff cannot recover, "for there is neither a joint right to convey the land, nor a joint right to possess it, or to let the possession."

The plaintiff alleges a joint title in his lessors. The jury cannot separate the title and find for the plaintiff against his own allegation. So one, who has no title, would be let into possession with the other lessors.

The allegatiou, that the demise was made by the four lessors severally as well as jointly, does not obviate this objection, and makes the matter worse, for the pleading is faulty, for uncertainty, which is ground for demurrer. A party must always set out his title, and when he claims a particular estate (one less than a fee simple,) he must show when it began, how it is derived, and its limit or quantity of interest. As it is expressed in the books of pleading, "the *commencement* of every particular estate must be set out." Stephen's Pleading, 306; Coke on Littleton, ch. 3, 3 b.

This plaintiff derives his title under a lease from four lessors. It is left uncertain, whether the lease was made by them jointly or severally. The inference is that it was made jointly, and, at the same time, severally. This, it seems to us, involves an absurdity. At all events it is too uncertain to be allowed in good pleading.

It is said, that the action of ejectment is a creature of the courts, contrived to effect the ends of justice. That is true, but it does not furnish a reason for allowing "this creature" to do violence to the rules of pleading.

PER CURIAM. Judgment affirmed.

WILLIAM BOWMAN v. PATRICK FOSTER.

Where a *certiorari* is returned to court, no proceedings can be had on it, unti notice of its return has been given to the person, against whom it issued.

Where a party, who is brought in by *certiorari*, may, upon motion, on the ground of irregularity, have the proceedings dismissed, but he waives that motion and submits to plead to the action, he has a right to do so.

The case of *Bender* v. *Askew*, 3 Dev., 150, cited and approved.

Appeal from the Superior Court of Law of GUILFORD County, at the Spring Term, 1850, his Honoi, Judge *Battle*, presiding.

The defendant gave his bond to one Peebles for $31.34, payable September 21st, 1841, which was endorsed after it fell due to James McNairy, the intestate of the plaintiff. In February, 1846, the plaintiff gave the bond to a constable to collect, and on the 14th March, 1846, a justice of the peace gave judgment for the defendant on a warrant on the bond, upon the allegation by the defendant and evidence, that it had been paid before the assignment. On the 15th of October, 1848, the plaintiff obtained a *recordari* upon his affidavit, that the witness, who gave evidence of the payment, was a person of doubtful character, and that the plaintiff believed his testimony to be false, and that the bond was unpaid and still due; and, farther, that the constable omitted to give him any information of the judgment, and that he had no knowledge teereof, until the spring or summer of 1848.

The proceedings were brought into court in October, 1848, and, without any notice served on the defendant, there was an order entered at the next term, that the

judgment was set aside, and a trial in court awarded; and at the succeeding October term, 1849, the plaintiff, for the want of a plea, took a judgment by default final for the debt and interest according to specialty, and thereon issued execution. At spring term, 1850, the defendant moved the court to set aside the judgment and execution, and allow him to plead. In support of the motion he made an affidavit, that no notice of the *recordari* had been given to him, and that, until the sheriff came with the execution, he was entirely ignorant of anything having been done in the matter, after the judgment had been given by the magistrate, and also that he paid the debt to Peebles while he held the bond. A rule was accordingly granted, and on service thereof the plaintiff showed cause against it by his affidavit, that he still believed the debt had not been paid, but was due, and, also, that from the length of time the *recordari* pended, before entering the judgment, he inferred, that the defendant had notice of it in fact. The rule was made absolute, and by leave of the court the plaintiff appealed.

Iredell, for the plaintiff.

Morehead, for the defendant.

RUFFIN, C. J. The purposes of justice require, that judgments by default should be under the control of the court at all times, and be set aside, when signed irregularly and against the course of the court, when there was no regular service of process, or other due notice to the party, and without his appearance. *Bender* v. *Askew*, 3 Dev., 150. The oath of this person is positive, that he had no information of any step taken in the matter for nearly four years after judgment given in his favor; and there is nothing in the record in opposition to that statement. It follows, necessarily, that the judgment could not stand against him. When set aside, the defendant

might, indeed, have insisted on the *certiorari* being dismissed, as having been improvidently granted. For, it was the plaintiff's own look out, that his agent should serve him faithfully; and, moreover, his delay in making enquiry into the matter, until the expiration of two and a half years after the judgment against him, constituted such laches, as ought to preclude him from this remedy. The defendant, however, did not insist on that, and was content to be admitted to plead, averring the merits to be with him; and to that there can be no just objection.

PER CURIAM. Judgment affirmed.

SAMUEL C. BENJAMIN v. REBECCA TEEL.

In a controversy respecting the probate of a will, any person who is entitled in interest, may become an actor. The course is to state on the record such matter as shews on which side the person becomes an actor, so as to shew distinctly, whether he may in the result be entitled to or liable for the costs.

Appeal from the Superior Court of Law of MARTIN County, at a Special Term in February, 1850.

A paper, purporting to be the will of Drury Teel deceased, was offered for probate by Benjamin, the executor, and its validity contested by the widow of the party deceased. The county court ordered an issue, *devisavit vel non*, to be made up, and also a notice to issue to James L. Teel and Mary Teel, the heirs and next of kin of the deceased, to come in and see proceedings. Those persons were infants, and a guardian *ad litem*, was appointed for them. The issue was afterwards tried and found against the will, and the executor appealed. In the superior court a motion was made on the part of the executor to set aside the issue, upon the ground that the widow

was not a party in interest, and that it ought not to have been made up at her instance. That was opposed on the part of the infants; on whose behalf the guardian moved that they should be admitted to contest the will as parties to the issue. Thereupon, the court denied the motion of the executor and allowed the other; and the executor appealed.

B. F. Moore, for the plaintff.
Biggs, for the defendant.

RUFFIN, C. J. Persons, to whom notice to see proceeding is given, are bound by them, and are, in the view of the court of probate, parties to the proceedings, as far as there can be said to be parties in such a controversy. It is true, they may not be actors in the cause, and therefore not liable to costs. But, unless they do something to preclude them, they may becom active at any time before the sentence is pronounced; for, until that is done, any party in interest is entitled to be heard for or against the script. The usual manner of effecting that with us has not been by a new and distinct allegation for or against the will; but by becoming a party to the issue, made up under the direction of the court, according to the statute. For, if such allegation were made, it would not entitle that person to an issue to be tried separately, as that might lead to opposite verdicts on the same matter; but the course is merely to state on the record such matter as shows on which side the person becomes an actor, so as to show distinctly whether he may in the result be entitled to or liable for the costs. The proceeding being *in rem*, any person may intervene to protect his interest while the thing continues *sub judice*.

PER CURIAM. Orders affirmed with costs.

WILLIAM TOW and wife v. GILBERT ELLIOTT.

Where a person, settling with a guardian, paid him, by mistake, more money than he was entitled to receive; *Held*, that he was entitled to recover the excess from the guardian individually.

Appeal from the Superior Court of Law of PASQUOTANK County, at the Spring Term, 1850, his Honor, Judge *Ellis*, presiding.

This was an action on the case.

It was in evidence on the part of the plaintiff, that some years since, one Thomas Lister, deceased, became the guardian of Margaret, Richard, and Elizabeth Lister, infant heirs of John Lister, deceased, and as such received a considerable amount of funds belonging to his said wards. At the death of the said Thomas Lister, this defendant became guardian to said Margaret, Richard and Elizabeth; and the wife of the plaintiff, then the widow of the said Thomas Lister, having duly administered on the estate of the said Thomas Lister, paid over to this defendant, without suit, the amount supposed to be due the said wards, amounting to some two thousand dollars: it was also in evidence from a reference and report made in this case, that the said administratrix of Thomas Lister paid to the said defendant, more than was justly due his said wards, by the sum of two hundred and five dollars, on the 3rd day of September, 1849. To recover back this sum this suit was brought.

The defendant insisted that the plaintiffs had no right to recover at all, but if they had, they could not recover against him individually in this form of action.

His Honor being of opinion with the plaintiffs, there was a verdict and judgment for $211.15, of which $205 is principal. From which judgment the defendant appealed.

A. Moore, for the plaintiffs.
Heath, for the defendant.

NASH, J. The action is brought to recover a sum of money paid to defendant by mistake. One of the most familiar heads in text writers on actions to recover money, is that of mistake. In this case it does not seem to be denied by the defendant, that the money claimed is justly due to the plaintiffs. It is questioned so feebly, as to amount nearly to an admission. He insisted, if they had a right to recover at all, they could not recover against him individually in this form of action. Why not? He had received the money through mistake, and it was still in his hands. He was the only person against whom the action could be brought. His receiving it as guardian could make no difference, as against the plaintiff; it was not the money of his wards, and was in fact held by him for the use of the plaintiffs. We must suspect the claim was resisted and the action brought to furnish the defendant with a satisfactory voucher of a proper disbursement of so much of the apparent funds of his ward. The action is properly brought in assumpsit.

PER CURIAM. Judgment accordingly.

ROBERT S. BURNEY v. RUFUS GALLOWAY.

An obligation in these words, "On or before the first day of January next, I promise to pay to Robert S. Burney or order 1$60, for the hire of a negro by the name of Abram, and the use of two full crops of boxes on Moore Creek. Witness," &c., is not a conditional obligation.

Appeal from the Superior Court of Law of BRUNSWICK County, at the Spring Term, 1850, his Honor, Judge *Settle*, presiding.

The declaration is in debt on a single bill under seal for $160, and *non est factum* pleaded. On the trial the instrument appeared to be in these words: "On or before the 1st day of January next, I promise to pay to Robert S. Burney, or order, one hundred and sixty dollars, for the hire of a negro by the name of Abram and the use of two full crops of boxes on Moore's Creek. Witness my hand and seal this 15th day of ..... 1848." The defendant thereupon moved for a nonsuit, because the bond produced was conditional and only bound the defendant to pay the money, provided the plaintiff let him have the use of the negro and two crops of turpentine boxes, whereas the plaintiff gave no evidence on those points, but declared on the bond as obliging the defendant absolutely to pay the money. But the court refused the motion, and the plaintiff had a verdict and judgment; and the defendant appealed.

No counsel for the plaintiff.
Strange, for the defendant.

RUFFIN, C. J. It is true the word "for" may make a condition; and it does so, when each party is subsequently to do some act, and upon the sound construction of the instrument, it is apparent, that the act on the part of the party suing ought to precede or concur in point of time with that stipulated by the other party. Many cases were cited in the argument for the defendant; but in all of them the contracts were so expressed as to appear to be executory on both sides, and amount to stipulations for mutual acts *in future*, which were, at the least, to be concurrent. Cases of that kind however have no application to one like the present. If the consideration, mentioned in the bond, was past, the obligation of the defendant to pay the money was, of course, intended to be absolute. But if it cannot be collected from the instrument—to which alone we are to look for its meaning in this respect—that the defendant had already had the use of the negro and boxes, still there is nothing to show that he was to have them before the day on which he was to pay the money. Suppose the expression in the bond had been "for value," without adding the word "received:" it is plain it would stand indifferent whether the value had been received before, or was to be received after, the making of the contract. Therefore it could not be said that the instrument purported to be conditional. But admitting that it could be construed as providing for value to be received, yet that provision could not be deemed a condition to be performed by the plaintiff, before he could have a cause of action, since neither the kind of value, nor the period of rendering the benefit, is specified. Now, it is not stated in this instrument, when the hire of the negro was to begin, nor for what period it was to continue. We are told at the bar, that the phrase "crops of boxes," means as many pine trees, prepared for making turpentine, as one hand will attend during a season. But, taking that to be so, it cannot be told what years the

defendant was to have the boxes, namely, whether in 1848, or whether a crop for one hand in that year, and for another in some other year. The words were probably intended merely to show on what transactions between the parties this money was due: namely, those of hiring a particular negro and the rent of certain turpentine boxes, and not to enter into any particulars of such hiring and renting. The case, therefore, falls within the common rule, upon which stipulations are deemed independent, when the one party engages, for example, to pay money at a certain day, for which the other party is to do other acts, which may or may not be performed before or at that day.

PER CURIAM. Judgment affirmed.

JAMES C. HOLMES v. ALFRED JOHNSON.

Where a society exists, which has its written rules and bye laws, it is not competent to shew by parol testimony, that there are other rules and usages, independent of those contained in such written rules and by-laws.

Where the general character of a party in an action of slander is attacked and several witnesses are introduced for the purpose of sustaining the attack, the Act of Assembly, requiring only two witnesses to a fact to be taxed in the bill of costs, does not apply. It is a case for the exercise of the discretion of the Judge presiding at the trial.

The case of *Hoyle* v. *Cowen*, 1 Hay., 21, cited and approved.

Appeal from the Superior Court of Law of SAMPSON County, at the Spring Term, 1850, his Honor, Judge *Settle*, presiding.

The action is for slanderous words spoken, imputing to the plaintiff the crime of stealing some watch guards and studs from the shop of the defendant in the town of Clinton; and was tried on the pleas of not guilty and justification. The plaintiff called a witness, who stated that he, the witness, the plaintiff and defendant were members of a society called "A Lodge of Odd Fellows," which met in Clinton; and that certain charges were preferred in the Lodge against the plaintiff by some member, and the witness and two other members were appointed a committee to investigate the same and make a report to the Lodge; that, in the discharge of his duty on the committee, the witness called on the defendant to state what he, the defendant, knew upon the subject of those charges, and the defendant gave him the information, as requested; and that after getting through with that matter, the defendant added, that there were other suspicious matters against the plaintiff, and then went on to accuse him of stealing watch-guards and studs from the defendant's store. Another witness for the plaintiff deposed, that he also was a member of the same Lodge, and an intimate friend of the defendant, and that on a certain occasion, when the defendant visited the witness, while the latter was very sick, they were engaged in a conversation respecting Odd Fellowship and the said Lodge, and the defendant stated to the witness, that he suspected the plaintiff of taking his studs and watch-guards, and also that the plaintiff was suspected by others of having stolen other articles at different times; and that the witness understood the communication to be made in confidence, though the defendant did not express himself to that effect.

The defendant then gave in evidence a printed pamphlet purporting to be the rules and by-laws of the said Lodge, regulating the duties and conduct of the members of the society; and among them was one requiring any member,

who knew any thing against the character or integrity of another to accuse him to the Lodge, and directing that thereupon a committee should be appointed to investigate the matter.

The defendant offered further to prove by a witness, that the Order of Odd Fellows is a society for charitable and benevolent purposes, and that, by the principles and usages of the Order, it was the moral duty of every member to keep the Lodge pure: to admonish any other member of any danger to his morals or his character or estate: and if any member did, or was suspected of having done, an improper act, to give information thereof to the Lodge and also to communicate the same to the members individually; and that those principles and usages exist, independent of the written and printed rules and by-laws, as a kind of common law of the order, treasured up in the bosoms of its members. But the court refused to receive the evidence: and the counsel for the defendant excepted thereto, and after a verdict and judgment against him the defendant appealed.

Strange, for the plaintiff.
W. Winslow, for the defendant.

RUFFIN, C. J. The execution is restricted to the question of evidence; and that, therefore, is the only point in the case. The court thinks his Honor's decision on it right. The object of the evidence seems to have been to show, that, as a member of the society mentioned, the defendant was bound to give the information he did to the two witnesses, and thence to insist, that the communications were privileged. But the evidence was either unnecessary or insufficient to establish such a privilege; and in either case it was not erroneous to exclude it. For, if by the the general law of the land applicable to the relation existing between those several persons, the defendant was

privileged to accuse the plaintiff to his brother members, he could have the full benefit of the defense, independent of the supposed regulations of the society. If, however, those regulations were material to the question, it seems plain that they would not have been established by the evidence rejected. The defendant had the full benefit of such as had been adopted by the society. One of them was directly applicable to this subject, and required the members to make known to the society, at its meetings, offences committed by their fellow members, for the legitimate purpose of having them enquired into and punished according to the rules. The defendant, however, insisted further, not that there was any other law of the order on the subject, but that there were certain usages and principles, suppposed to be treasured up in the bosoms of its several members, that made it a moral duty of the defendant to make those charges on the plaintiff. It seems to the court, that such evidence is altogether too vague and unsatisfactory to authorize the finding from it any regulation of the society. The origin and antiquity of the society are not stated, and we must suppose that it has lately sprung up, and has expressly adopted such by-laws, as were decreed necessary for their government in addition to the duties imposed by the law of the country. It is idle to talk of a common or traditional law, applicable to a matter like this and peculiar to this Lodge; and it is obvious that the attempt was to get from the witness his opinion of the moral duty of the defendant under the circumstances, instead of stating what the law of the society, as adopted and recorded, required of the defendant as a member of the association. Such evidence could have no legitimate effect on the minds of the jury, but might mislead, and therefore was properly rejected.

Upon the trial the defendant attacked the general character of the plaintiff, and to that point examined nine

witnesses. In opposition thereto, and in support of his ch`racter, the plaintiff axamined about thirty witnesses. After the verdict the defendant moved, that in taxing the costs only two of those witnesses should be allowed to the plaintiff. But the presiding judge thought they were necessary or proper to the plaintiff's case under the circumstrnces, and refused the motion. The court holds, that the Act of 1783, which provides that the party cast shall not be obliged to pay for more than two witnesses to prove a single fact, is not to be construed so strictly as not to allow of more than two witnesses in any case, or always to tax the party summoning them with all but two. The general purpose of the statute is to give to the gaining party all such costs as are necessarily or reasonably incurred by him, but not to put it in his power to oppress the other party by wantonly accumulating costs. Commonly two witnesses to any one fact are sufficient to establish it. But others may become necessary and almost indispensable, in order to counteract the testimony of witnesses offered on the other side; and in such a case the losing party is not necessarily exonerated from the payment of such additional witnesses, but may be taxed with them. *Hoyle* v. *Cowan* 1 Hay., 21. That is peculiarly applicable to a case like the present, where the point involved was the general character of the party, (which cannot strictly be called a single fact) and it was necessary to counteract many witnesses, adduced on the oposite side. Upon such a question much must depend upon the number and respectability of the witnesses and their opportunities of knowing the party: and therefore it is a very proper case for the exercise of a discretion of the judge presiding at the trial. In the present case this Court must take it for granted, that his Honor deemed the witnesses useful and proper, and that they were truly called for the purposes of justice and not to oppress the defendant; and under those circumstances the Court cannot interfere with his dicision.

PER CURIAM. Judgment affirmed.

WILLIAM SATTERFIELD v. CHARLES SMITH.

Where, before a hiring commenced, a paper writing was read, purporting to contain the terms of the hiring, and also before the hiring commenced, the crier in an audible voice announced other terms; *Held*, that the hirer or his agent had a right to make such alteration.

Appeal from the Superior Court of Law of PEAQUIMANS County, at the Spring Term, 1850, his Honor, Judge *Ellis*, presiding.

Heath and *Jordan*, for the plaintiff.

A. Moore and *Burgwin*, for the defendant.

PEARSON, J. The action was for a breach of contract for hiring. One of the terms of which was (as the plaintiff alleged,) that "the negro should not be employed at a fishery or sent by water."

The plaintiff read in evidence a paper writing, purporting to contain the terms of hiring, one of which was, that the negro should not be employed at a fishery or sent by water, and proved by several witnesses that no paper was read aloud by the crier, before the hiring commenced.

The defendant called several witnesses, who swore that no such paper was read in their hearing, and that the crier, just as the bidding commenced, said in a loud voice, "the negro can be sent by water or put at a fishery, at the risk of the hirer." He also called several other witnesses, who swore that after the paper was read, and before the hiring commenced, the crier said in a loud

voice, "the negro can be sent by water or put at a fishery at the risk of the hirer." This last evidence was objected to, but was admitted.

The defendant employed the negro at a fishery; but there was no evidence of any damage.

The court charged, that, if the jury believed that it was one of the terms of the contract of hiring, that the negro should not be employed at a fishery, as alleged by the plaintiff, he was entitled to recover nominal damage. But if the person hiring, was, by the terms of the contract, allowed to put the negro at a fishery "at his risk," as the negro had been injured, the plaintiff could not recover. He also charged, that notwithstanding the paper had been read aloud, it was competent for the plaintiff or his agent to change the terms, and if this was done before the hiring, the plaintiff could not recover.

The case does not set out upon what exception the plaintiff appealed.

There is no error in the charge and we are at a loss to see upon what ground the evidence was objected to.

"*The paper*" which was read before the hiring began was not adopted and agreed on by the parties as pre-appointed evidence of the terms of hiring, and the rule that a written instrument shall not be contradicted, added to, or varied by parol proof, has no sort of application. The paper contained a mere proposal of terms, and when it was found, that those terms were not accepted, the plaintiff or his agent had a right to vary them as they thought expedient.

PER CURIAM. Judgment affirmed.

SAMUEL TOPPING. v. NATHAN G. BLOUNT.

The sole purpose of the Act of 1827, relating to indorsers, was to turn the conditional contract between the endorser and the holder of a bond, into an unconditional one. It was not intended to charge the indorser, as if he had executed bond as a co-obligor, or upon an indorsement without consideration or to deprive him of the benefit of the statute of limitations.

The cases of *Williams* v. *Irwin*, 3 Dev. & Bat., 78, and *Ingersoll* v. *Long*, 4 Dev. & Bat.. 293, cited and approved.

Appeal from the Superior Court of Law of BEAUFORT County, at the Spring Term, 1850, his Honor, Judge *Bailey*, presiding.

The plaintiff declared in several counts in assumpsit, but the only question made in the bill of exceptions arises on a count, charging the defendant as endorser of a bond for $652.22, executed by Littlejohn Topping and William Holland, on the 22nd of January, 1837, and payable twelve months after date to Blount. The pleas were non assumpsit and the statute of limitations.

On the trial the evidence was, that, about the time the bond fell due, the defendant endorsed it in blank and passed it for value to Susan Jones, and that she held it until the 20th day of November, 1845, and received various payments thereon, which reduced the sum then due thereon to $555.66; and that on that day Littlejohn Topping and the plaintiff executed a bond for the said sum of $555.66 payable to Susan Jones, which she excepted in discharge of the former bond, and thereupon directed her agent to deliver the first bond to the said Littlejohn Topping or to the plaintiff, and the agent shortly thereafter delivered it into the hands of the plaintiff; Littlejohn Top-

ping, the principal debtor, failed to make any payment on the second bond, and on the 13th of August, 1847, the plaintiff discharged the same by giving Mrs. Jones a bond for the sum due; executed by himself and another person as his surety. The plaintiff then filled up Blount's blank endorsement by making it to himself, and brought the present action on the 29th of September, 1847.

The counsel for the plaintiff thereupon moved the court to instruct the jury, that, if they believed the evidence, the plaintiff was a purchaser of the bond sued on, and had a right to fill up the endorsement in his own name, and, so was entitled to recover thereon, unless the action was barred by the statute of limitations. And, as to the latter point, the counsel insisted, that Littlejohn Topping, by giving the bond of November 20th, 1845, in renewal of that sued on, acknowledged the latter as then constituting a subsisting liability on him, which implied a promise to pay it; and that, by such acknowledgement and promise of the principal, the case was taken out of the statute of limitations in respect to Blount, as endorser and surety. The court instructed the jury, that, whether the transaction between the plaintiff and Susan Jones or her agent were a purchase of the bond or not, the defendant was protected by the statute of limitations, and that the acts of Littlejohn Topping mentioned were not sufficient to renew a liability of Blount as endorser. The jury found for the plaintiff on the first issue and for the defendant on the statute of limitations; and the plaintiff moved for a *venire de novo* upon the ground of misdirection, which was refused, and he appealed.

Biggs, for plaintiff.
J. W. Bryan, and *J. H. Bryan*, for the defendant.

RUFFIN, C. J. It is difficult to conceive the meaning of the proposition, that, from the act of giving a new bond

in place of a previous one, a promise is implied by law to pay such prior bond. To whom can the promise be supposed to be made? and to what end is it to be implied, when the debtor actually gave an obligation under seal for the same money? It is somewhat surprising, therefore, that the plaintiff should have had a verdict upon any part of the case. But, without notice of that point, the court holds the instructions and verdict upon the statute of limitations to be unquestionably correct. The contracts of the obligor and endorser are in their nature several, and no act of the former can change the latter. The act of 1827, indeed, says the endorser shall be liable as surety to the holder: and it is insisted, that the alleged liability of the defendant arises under that provision. But it has been for some time settled, that the sole purpose of that act was to turn the implied conditional contract, between the endorser and holder, into an unconditional one: and that it was not intended to charge the endorser, as if he had executed the bond as co-obligor, or upon an endorsement without consideration, or to deprive him of the benefit of the statute of limitations, by exposing him to stale demands, kept alive, perhaps, by collusion between the obligor and the holder. *Williams* v. *Irwin*, 3 Dev. and Bat., 74; *Ingersoll* v. *Long*, 4 Dev. and Bat., 293. The act does not change the mode of declaring against the endorser, except in omitting the former requisites of a demand on the obligor and a notice of the dishonor to the endorser. Indeed, the count, upon which it is sought to recover from the defendant, charges him as endorser merely—that is an assumpsit upon a several and simple contract: and, consequently, the case is within the express provision of the act of 1715.

PER CURIAM. Judgment affirmed.

WILLIAM W. TERRY v. JOHN P. VEST, Adm'r., &c.

An administrator is protected by judgments, rendered against him within the nine months allowed him to plead, though in suits after that in which he pleads them.

An administrator, who establishes his plea of fully administered is entitled, of course, under our Statute, to his costs; and the plaintiff, though he take a judgment *quando*, cannot have a judgment against the surety in the administrator's appeal bond, the case having been tried upon appeal.

The cases of *Bryan* v. *Miller*, 10 Ired., 120; *Welborn* v. *Gordon*, 1 Murph., 502, and *Battle* v. *Rorke*, 1 Dev., 228, cited and approved.

Appeal from the Superior Court of Law of FORSYTH County, at the Spring Term, 1850, his Honor, Judge *Battle*, presiding.

The defendant administered on the estate of the intestate at December term, 1848, of the county court; and on the second of January, 1849, the present warrant was brought in debt on a bond of the intestate for $81.13 and returned before a justice of the peace. The defendant appeared before the magistrate and alleged his want of assets to pay any part of the debt, and prayed that the trial should be postponed to some day after the expiration of nine months from the administration taken. But the magistrate refused the postponement, and gave an immediate and absolute judgment for the debt, interest, and costs; and the defendant thereupon appealed to the county court. Upon the filing of the appeal the defendant moved to quash the judgment on the ground of the magistrate's refusal to postpone the trial. The court refused the motion, but allowed the defendant time until September term, 1849, to plead in respect of the assets.

At that term he accordingly pleaded *plene administrvit*, no assets, and prior judgment. After a decision in the county court, the plaintiff appealed, and on the trial in the superior court the defendant offered to prove, that he had applied all the assets to the satisfaction of judgments obtained against him prior to September, 1849, in suits brought after January of that year. The plaintiff objected to the evidence, but the court received it, and the jury found, that the defendant had fully administered. Thereupon the plaintiff signed a judgment *quando*, for the debt; and he also moved for judgment therefor against the surety for the appeal from the judgment of the magistrate. But the court refused the latter motion, and gave judgment against the plaintiff for the defendant's costs; and thereupon the plaintiff appealed.

Morehead, for the plaintiff.

Iredell, for the defendant.

RUFFIN, C. J. The course of the justice of the peace was directly in opposition to the act of 1828, and therefore erroneous. The postponement of the trial of a warrant, brought before the expiration of nine months from the administration, is not in the discretion of the magistrate, but it is made peremptorily his duty; that is, if required by the administrator, for whose benefit the act was passed. But it is not material now to consider that matter, since the administrator had in the county court the benefit of the delay in pleading until the end of the nine months, and the question is as to the effect of his plea. As to that point the recent case of *Bryan* v. *Miller*, 10 Ired., 129 is decisive, as it establishes as the necessary construction of the statute, that the administrator is protected by judgments rendered against him within the nine months, though in suits after that in which he pleads them.

As the administrator established his plea of *plene administravit*, he was, of course, entitled under the act of 1777 to his costs. *Welbom* v. *Gordon*, 1 Murph., 502. That rule is not altered by the statute, which allows a plaintiff, contrary to the common law, to sign judgment *quando* after issue joined on *plene administravit* and found against the plaintiff; as was expressly held in *Battle* v. *Rorke*, 1 Dev., 228.

It follows necessarily from those positions, that the plaintiff could not have judgment against the surety for the appeal, for, it is impossible there should be judgment against the surety, when in the same record the judgment is for the principal. If the original judgment had been against the intestate and he had appealed and died, and the cause been revived against the administrator, then the surety would have been liable for the debt formed and the costs; for, supposing that the administrator could therein put the question of assets in issue and it were found for him, such finding would not cover the whole obligation of the surety, who undertook for the ability of the debtor to pay the debt, if any should be adjudged. But when the administrator appeals, the very question may be, and generally is, whether he hath assets; and if that be found for him, it entitles him to judgment, that the plaintiff take nothing by his writ; and that covers the entire undertaking of the surety for his principal, the administrator.

It is considered, therefore, that the decisions were right on each point, and the judgment is affirmed.

PER CURIAM. Judgment affirmed.

JOSIAH BRIDGERS and wife v. ISAAC W. HUTCHINS, Adm'r, &c.

An advancement to a husband by his father-in-law is an advancement to the wife.

The release or cancelling of the bonds of a child, with an intention thereby to prefer him in life, is as much an advancement as so much cash.

Appeal from the Superior Court of Law of WAKE County, at the Spring Term, 1850, his Honor, Judge *Manly*, presiding.

The suit is for an account and distribution of the personal estate of Isaac Hutchins, who died intestate in 1844, leaving four children; of whom the *feme* plaintiff is one. After the administrator's answer, it was referred to the master to state the accounts of the administration, and also to enquire whether the intestate made any advancements to his children respectively and what they were, and upon the basis thereof, if found, to state the share due to the several children, if any.

The report ascertained the surplus in the hands of the administrator, and, after taking into the fund the several advancements made to the children respectively, it found that nothing further was going to the plaintiffs, by reason of an advancement made to the husband, Bridgers, as found by the master upon the examination of Bridgers. Besides advancements in slaves, and other effects, and cash given, Bridgers stated before the master, that some years before 1842, but after his marriage, he borrowed from the intestate the sum of $250 and $200, and at the several times of borrowing gave his notes therefor to the

intestate: and that in 1842 the intestate gave him up the two notes, to be cancelled, saying, at the same time, that his reason for doing so was, that he, the intestate, did not want them to come against the examinant after his, the intestate's death, and that he was then old and did not expect to live long.

The plaintiffs objected to so much of the report as found those sums of $200 and $250 to be advancements: and upon argument the exception was overruled and the petition dismissed with costs, and the plaintiffs appealed.

McRae and *W. H. Haywood*, for the plaintiffs.
G. W. Haywood and *H. W. Miller*, for the defendant.

RUFFIN, C. J. The decree must be affirmed with costs. A gift to the husband during coverture is undoubtedly an advancement to the wife: and it is quite clear, that the release of cancelling of the bonds of the child, with the intention thereby to prefer him in life, is as much an advancement as so much cash. *Gilbert* v. *Wetherell*, 2 Simons and Stuart, 254.

PER CURIAM. Decree affirmed.

THE STATE v. WILLIAM MOORE.

Turpentine, which has run out of the trees into boxes cut into the tree for the purpose of receiving the liquid, is the subject of larceny.

But to support an indictment for stealing two barrels of turpentine, it must appear that the turpentine was in barrels, when it was stolen, not that it was dipt from the boxes in small quantities, from time to time, and then deposited in barrels.

Appeal from the Superior Court of Law of BEAUFORT County, at the Fall Term in July, 1849, his Honor, Judge *Manly*, presiding.

This is an indictment for petit larceny in stealing two barrels of turpentine, of the goods and chattels of Frederick Grist: and on not guilty pleaded there was a special verdict to the effect following: Grist owned a piece of land, on which some pine trees were boxed for making turpentine in the year 1846, and he cultivated them during the months of March and April and a part of May in that year, and he then discontinued the working of them for that season. In August, 1846, the prisoner during two days secretly dipped out of the said boxes, made by Grist, as much turpentine in quantity as two barrels, which had run into the boxes after Grist had discontinued the working in May, and he, the prisoner, put the same into two barrels which he had provided and kept concealed in the woods, and he afterwards carried away the said two barrels of turpentine secretly, and sold them for his own gain. Thereupon, the jury say, that they are ignorant, whether the said turpentine was the subject of larceny, and, if it be, whether the said facts sustain the allegation, that the prisoner stole two barrels of turpentine:

and upon those questions they pray the advice of the court, &c. Upon the verdict judgment was given by the court for the prisoner, and the solicitor for the state appealed.

Attorney General, for the State.
J. H. Bryan, for the defendant.

RUFFIN, C. J. Upon the first question the Court is of opinion, that the turpentine was the subject of larceny. We learn from a former special verdict, which appears in the record, and from various other sources—including our own observation—that the mode of making turpentine is this: an excavation, commonly called a box, is made in the body of the tree near the ground, into which the turpentine runs from the tree above; and, in order to produce a flow of the gum or to promote it more freely, the tree is occasionally scored above the box with a sharp iron instrument, called a round-shave, and the scoring is done in such a manner as to direct the current of the descending sap into the box: and the turpentine is then collected or dipped out of the box from time to time as it becomes full, during the season of gathering, which ordinarily begins in March and ends in October. The scoring often extends up the body of the tree to the height of ten or fifteen feet, and in its descent a part of the turpentine generally adheres to the tree and becomes hard, while that, which remains liquid, continues its course downwards until it drips in the box, where it remains until collected, and put into casks for use or market. Such being the process in this business, it seems clear, that turpentine, when in the boxes in a state to be dipped up, is personalty. It no longer forms a part of the tree, but it exists separate from the tree, and has been separated by a process of labor and cultivation. If, like the sap of the sugar maple, its flow were directed into a vessel set

on the ground near the tree, no one would doubt its being severed from the realty. Now, this is the same in substance. For the box, though in the tree, is but a more convenient receptacle for the turpentine, after it has been extracted or has been made to exude from the pores, which contained it, while in the tree, as a part of it. When it ceases to be a part of the tree, it necessarily becomes a chattel.

Upon the other question, however, it is the opinion of the court, that it is a material part of the description of the turpentine, that when taken it was in barrels. That would not be so, if the term "barrel" imported or could be referred to quantity only; for, one may undoubtedly be convicted, when the evidence shows a larceny of more or less in measure or weight than is charged in the indictment. But a "barrel" of turpentine, or a "barrel" of flour, or a "hogshead" of tobacco, in agricultural and mercantile parlance, as also in the Inspection laws, means *prima facie*, not a certain quantity merely, but, further, a certain state of the article: namely, that it is in a cask. The statute exacts, for example, that every "barrel of turpentine" shall contain thirty-two gallons, and be in good and sufficient casks made of staves of certain dimensions. "A barrel of turpentine" is in a degree a term of art in trade and in the law: and when one says, he has so many barrels of turpentine, he is universally understood to mean that number of casks of the statute size, &c., containing turpentine, and, consequently, that the casks, as well as the turpentine, are his. "A barrel" of turpentine or flour is, thus, one thing, constituted by both the cask and its contents; and it is known so to be by that description. Upon that point, therefore, the judgment was properly given for the prisoner.

PER CURIAM. Judgment affirmed.

ETHELDRED J. PEEBLES v. HEZEKIAH LASSITER.

Under the act of 1840, ch. 37, which gives to the landlord, who has leased to a tenant, the rent to be paid in a part of the crop, a certain interest in the crop raised; if the tenant remains in possession until an execution against him is levied on the whole of the crop, although the landlord *may* have a special action on the case against the officer levying, yet he cannot maintain an action of trespass, for he has neither the possession nor the property.

Appeal from the Superior Court of Law of NORTHAMPTON County at the Spring Term, 1850, his Honor, Judge *Manly*, presiding.

The action is trespass *de bonis asportatis* for taking 28 barrels of corn belonging to the plaintiff, and was tried on the general issue. The evidence on the part of the plaintiff was, that one Wheeler leased a piece of land from the plaintiff for the year 1848, and agreed to give as rent therefor one-fifth part of all the crops raised on the land that year, or the sum of $25, at the option of the plaintiff. That the plaintiff furnished Wheeler with certain provisions during the year, and it was also argued between them, that they should be returned out of the crop. That Wheeler entered and made crops of sundry articles, and among them a crop of corn, and that, during the autumn, and while Wheeler was gathering the crop of corn, and before the provisions had been returned or any part of the rent had been paid to the plaintiff, and before he had elected whether he would take the rent in money or a share of the crops, the defendant, being a constable, seized 28 barrels of corn under executions issued against the

goods of Wheeler by a justice of the peace, and sold the same. Upon the foregoing evidence the court was of opinion that the action would not lie, and ordered a nonsuit and the plaintiff appealed.

B. F. Moore, for the plaintiff.
Bragg, for the defendant.

RUFFIN, C. J. The right of the plaintiff is supposed in the argument to arise under the Act of 1840, ch. 37, of which the title is "an act to protect the interests of landlords," and by which it is enacted, that "when any lessee of land shall agree to pay a certain share of his crops or a specific quantity of grain for the rent of land, he shall cultivate under his lease, so much of the crop of the lessee raised on his farm under lease, as will be sufficient to satisfy the rent to his landlord for the year, shall be exempt from execution and from the lien of all other debts, until the end of each respective year." It is said, that as the purpose of the act is so plainly declared to be the protection of the interests of landlords, it must receive such a construction as will at all events effect that purpose: and that, as it is necessary to that end, that the landlord should have the property in the crops, to the extent of the whole of them, for his satisfaction in the first instance, leaving the surplus to the tenant, the court will so interpret the statute. But such a rule of construction is altogether inadmissible: for, although it be true, that the Legislature intended by the act to secure rents to landlords, yet, upon the mere declaration of such intent in the title, the court is not at liberty to apply any and all means, that may be necessary or useful to such security, but is restricted to such means as the statute may provide, and to the extent therein prescribed, advancing the remedy, however, as far as a liberal interpretation of the language will allow. Now, in the present instance, it is

impossible to invest the landlord with the whole property in the crops, since that would be in direct opposition to the express words of the act: which, are that "so much" (only) "of the crop, as will be sufficient to satisfy the rent for the year, shall be exempt from execution." The whole crop, therefore, cannot belong to the landord: and it must be admitted, we think, that unless he has the whole, he has not the property in any part—since there is nothing in the act to make him the owner of one part more than another, but he is only the creditor of the lessee for so much rent. In order to secure the payment of the rent, the crop is *pro tanto* exempted from execution against the tenant. Still, the property remains in the lessee, and it would seem that, by reason thereof, the lessee might have an action against the sheriff for seizing that part of the crop. Perhaps, also, the landlord may have an action grounded on the statute against the officer or creditor for doing execution on the tenant's crops on the land, without leaving sufficient to pay the rent reserved in kind. Something like that was, probably, thought of by the writer of the act: and it is possible the words might be stretched that far and the remedy given as under an act in England in *pari materia* namely, St. 8 Ann., C. 14, for the better security of rents and to prevent frauds by tenants. Thats tatute has, however, several material provisions, which are not in ours, and which show that the security of the rent was alone in the purview of the act, and that it was meant, the landlord and no other should have the action for taking the goods in execution. The one is, that, before the removal of the goods by the officer, the creditor shall pay the landlord the rent due on the premises at the time, not exceeding that for one year: and the other is, that if the tenant fraudulently remove his goods from the premises, the landlord may, nevertheless, distrain them elsewhere within a fixed period. Upon that act a special

action on the case has been framed for the landlord against the sheriff for taking the goods without paying the year's rent, upon notice that it was due and in arrear. Possibly an action may likewise arise to the landlord upon the act of 1840 for doing execution without leaving his share of the crop. But, if so, it must be like a special action on the case on the statute, upon the general principle laid down by Lord COKE, 10 Rep., 75, that, when a statute prohibits anything, the party grieved shall have an action upon the statute, although it be not given by the words of the statute. The difficulty is in holding, under the imperfect provisions of the act of 1840, that the landlord is a person grieved, since it does not charge the officer or the creditor with any duty to him, nor vest in him a property in any part of the crop or lien on it, but leaves the whole at the absolute disposition of the tenant. Whether, however, such an action will lie on this act in any case, or, if so, whether it would lie when the rent is not to be paid exclusively in the specific crops, but in them, or in money, are questions upon which farther consideration would be bestowed, if the decision of the case turned on them. But it does not: for this is an action of trespass, and is founded on possession in the plaintiff, and here he had neither the property nor the possession, but both were in the lessee at the time of the taking; and therefore the action will not lie.

PER CURIAM. Judgment affirmed.

F. & S. WARING v. DANIEL RICHARDSON.

Where money has been received by an agent, a demand or a misapplication of the money is necessary before an action can be brought, and the statute of limitations only begins to run from the time of such demand.

The cases of *Potter* v. *Sturges*, 1 Dev., 79; *White* v. *Miller*, 3 Dev. & Bat., 55, and *State* v. *Sugg*, 3 Ire., 96, cited and approved.

Appeal from the Superior Court of Law of PASQUOTANK County, at the Spring Term, 1850, his Honor, Judge *Ellis*, presiding.

This was an action of assumpsit, brought to recover the sum of $61.19, with interest on the same from the 15th of March, 1842. The plaintiffs proved by their agent that on the 15th of March, 1842, the defendant received from them a note to collect as their agent: that the note was the property of the plaintiffs and was originally drawn payable to one.

For the purpose of repelling the plea of the statute of limitations and showing the collection of the note by the defendant, the plaintiffs called a witness, who swore, that, as the attorney of the plaintiffs, he called on the defendant several times within three years before the beginning of this suit, and, in the name of the plaintiffs, demanded payment of the money: that the defendant said he had collected the *money*. This witness also stated, that the defendant raised no objection to paying said money, and never pretended that he had ever paid, previous to that time, until the last time he called upon him, when he pretended that the plaintiffs had collected the amount of this claim from another person, against whom he had brought

a suit. He did not say in this conversation, that he had paid the money himself, but that he was a surety with others of the persons sued, and that the said sureties paid the said claim. The witness said, that this allegation of payment was made only in the last conversation they had on the subject, and that the said claim had not been collected in the said suit The court charged the jury, that, if they believed the witness, the plaintiffs were entitled to recover: that the words used by the defendant, when taken in connection with the other evidence, was an acknowledgment of an existing debt, from which the law would imply a promise. The jury returned a verdict for the plaintiffs. Defendant moved for a rule for a new trial. Rule granted and discharged. Judgment of the court was rendered, from which defendant prayed an appeal to the Supreme Court, which was granted.

Heath, for the plaintiffs.
W. N. H. Smith, for the defendant.

NASH, J. It is deemed unnecessary to decide the question, upon which the opinion of the judge below was given. From the statements of the case, the point did not arise. The plaintiffs had put into the hands of the defendant, for collection, a promissory note, and the action is brought for collecting the money and not paying it over. Among other defenses the defendant relied upon the statute of limitations. The complaint is not for a breach of duty in collecting, not for undertaking and entering upon an agency, for a compensation, and then either failing to perform it, or performing it so negligently that an injury was sustained by the plaintiffs; but for the money, secured by the note, which the plaintiffs allege the defendant had received. The plea of the statute of limitations assumes or admits, that the money had been received by the defendant, but when it is accompanied

by the general issue, as in this case, it does not exempt the plaintiffs from the obligation to prove it. Accordingly the plaintiffs did not rely upon this assumption, but gave in evidence the admission of the defendant that he had received it. The admission was made within three years next before the bringing of the action, and when, for the first time, as far as the case discloses, the money was demanded of him. The defendant was a collecting agent of the plaintiffs to receive the money. His reception then was a rightful one; and to give the plaintiffs a right of action for its detention, a demand or evidence of the misapplication of the money was necessary. *Potter* v. *Sturges*, 1 Dev., 79; *White* v. *Miller*, 3 Dev. & Bat., 55; *State* v. *Sugg*, 3 Ire., 96; and from the time of the demand the statute began to run. Strike out the admission of the defendant and the demand then made, and there was no evidence in the case that the money ever had been received by him or of any demand upon him. And according to that admission the money might have been received by him the day before. The length of time in which the claim for collection has been in the hands of an agent may, under the circumstances, be evidence both of the collection of the money and its use by him. But the case does not state the length of time the note put into the hands of the defendant had to run, or whether it was then at maturity. We are merely informed that the money had been received by him, and that within three years before the bringing of the action, at which time also the demand was made. The statute never was set in motion, according to the case, until the time mentioned in the statute.

PER CURIAM. Judgment affirmed.

ANDREW J. BARWICK v. JOSHUA BARWICK, et al.

In an action of trover, except for a mere temporary conversion, the plaintiff recovers the value of the property recovered, and, therefore, to entitle him to recover, he must show title and a possession, or a present right of possession.

The cases of *Hostler* v. *Scull*, 2 Hay, 139; Tay. 153. *Lasper* v. *McFarland*, N. C. T. Rep., 187, and *Andrews* v. *Shaw*, 4 Dev., 70, cited and approved.

Appeal from the Superior Court of Law of WAYNE County, at the Spring Term, 1850, his Honor, Judge *Bailey*, presiding.

J. H. Bryan and *Mordecai*, for the plaintiff.
No counsel for the defendants.

PEARSON, J. Benjamin Sutton, by his will, gave a number of slaves to his wife, Sarah Sutton, for her life: and at her death to be divided among his four daughters, one of whom was Winifred, the wife of Joshua Barwick, one of the defendants. Joshua Barwick and his wife sold their interest in said slaves to the plaintiff, who took four of them into his possession. Afterwards, the said Joshua sold the two slaves sued for to Wood, who, wth the assistance of the other defendant, Brown, took them from the possession of the plaintiff, and sent them out of the State; whereupon this action of trover was brought.

The case made up by his Honor, states that it was not proven that Sarah Sutton was dead. The plaintiff insisted that he was entitled to recover on two grounds: 1st, because he had the title; and 2nd, because he had the possession, and could recover against wrong doers.

His Honor charged, that the plaintiff could not recover on the first ground, because it was not proved that Sarah Sutton was dead; but he charged, on the second ground, that, if the plaintiff was in possession of the slaves, and the defendants took them, and sent them out of the country, he was entitled to recover their value, with interest from the time of the conversion: as the defendants were wrongdoers and had shown no title. There was a verdict for the plaintiff, and, from the judgment thereon, the defendants appealed.

The defendants excepted to the charge of his Honor, upon the second ground, and we think the exception well founded.

The bare possession is sufficient to maintain an action of trespass against a wrongdoer, for the gist of that action is an injury to the *possession*, and the measure of damage is not the value of the property, but the injury done to the plaintiff by having his possession disturbed.

In trover, the injury done by the *wrongful taking* is waived, and the plaintiff supposes he has lost the property: and alleges that the defendant found it and wrongfully converted it to his own use. So the gist of the action is not, that the defendant, having found the property, took it into his possession, but that, after doing so, he wrongfully converted it to his own use, and the measure of damage is the value of the property.

It is true, that when nothing appears, but the fact that the defendant took the property out of the possession of the plaintiff and converted it to his own use, trover will lie. For the possession of personal property is *prima facie evidence* of title, and in the absence of any proof to rebut this presumption, the person in possession is taken to be the owner and can recover the full value. But, if it appears on the trial, that the plaintiff, although in possession, is not in fact the owner, and that the property belongs to a third person, the presumption of title, inferred from

the possession, is rebutted: and it would be manifestly wrong to allow the plaintiff to recover the value of the property. For the real owner may forthwith bring trover against the defendant, and force *him* to pay the value a second time, and the fact that he had paid it in a former suit would be no defense. When trover is brought and the defendant satisfies the judgment, he pays the value of the property, and the title is vested in him by a *judicial* transfer, because he has paid the *price*. Consequently, trover can never be maintained, unless a satisfaction of the judgment will have the effect of vesting a good title in the defendant, except when the property is restored, and the conversion was temporary. Accordingly, it is well settled as the law of this State, that to maintain trover, the plaintiff must show title and a possession, or a present right of possession. *Hostler's administrators* v. *Scull*, 2 Haywood, 139; Taylor, 152; *Laspeyre* v. *McFarland*, N. C. T. R., 187; *Andrews* v. *Shaw*, 4 Dev., 70.

These are cases in the English books, and in the reports of some of our sister states to the contrary; but we must be allowed to say, that the doctrine of our courts is fully sustained, by the reason of the thing, and is most consonant with the peculiar principles of this action. The cases differing from our decision, are all based upon a misapprehension of the principle laid down in the leading case, *Delimere* v. *Armory*. In that case the jewel was lost, and was found by the plaintiff, a chimney sweeper. He had a right to take it into possession, and became the owner, by the title of occupancy, except in the event of the true owner becoming known. The former owner of the jewel was not known, and it was properly decided that the finder might maintain trover against the defendant to whom he had handed it for inspection, and who refused to restore it.

But the result of that case would have been very different, if the owner had been known. The defendant could then have said to the plaintiff, you have no right to make me pay you the value, when I must forthwith deliver up the property to the owner, or else pay him the value a second time.

The distinction between that case, when the possessor was the only known owner, and the ordinary case of one, who himself has the possession wrongfully and sues another wrongdoer for interfering with his possession, the true owner being known and standing by, ready to sue for the property, is as clear as daylight.

In this case, for instance, as the facts appeared on the trial, the plaintiff was in the wrongful possession, which was disturbed by the defendant, and for that injury he had a right to recover in trespass. But Sarah Sutton was known as the true owner, and had a right to demand her property of the defendants, or else to recover its value, and they could not protect themselves by showing that they had paid the full value to the plaintiff, under the coercion of a judgment and execution. This result would seem, by the *reductio ad absurdum*, to show that the inference from the case of *Delimere* v. *Armory*, that trover can be maintained against a wrongdoer by one not having a naked possession, when the true owner is known, is contrary to good sense. That which is not good sense, is not good law.

The judgment must be reversed and there must be a *venire de novo*.

PER CURIAM. Judgment reversed and *venire de novo*.

RICHARD FELTON v. SAMUEL SIMPSON.

In order to raise the presumption of the grant of an easement, two things are necessary: there must be a thing capable of being granted, and there must be an adverse possession or assertion of right, so as to expose the party to an action, unless he had a grant.

Appeal from the Superior Court of Law of PERQUIMANS County, at the Spring Term, 1850, his Honor, Judge *Ellis*, presiding.

A. Moore, for the plaintiff.
Heath and *Jordan*, for the defendent.

PEARSON, J. This was a case for an injury to land and a crop of corn. The plaintiff has owned and been in the possession of the land, ever since the year 1822. Before that time, a dam was constructed on the land of one Welch, which was situated above and adjoined the land of the plaintiff. The effect of the dam was to protect the land of the plaintiff from sudden inundations in heavy falls of rain, by ponding the water, until it could be drained off by ditches leading from the pond through the plaintiff's land to a swamp below. The plaintiff had been in the uninterrupted enjoyment of the benefit of this protection of his land from the year 1822 up to 1848, when the defendant cut through the dam, and a large body of water, then collected from recent falls of rain, passed through on the plaintiff's land, overflowed his ditches, flooded his land and injured his crop of corn. For this injury to his land and corn, the action is brought. The case does not state, by whom the dam was constructed, or for what purpose.

The court instructed the jury, that, if the plaintiff had been in the uninterrupted enjoyment of the benefit of this protection afforded by the dam and the ditches to his land, for more than twenty years, he had acquired such a right or easement, in the dam, as to entitle him to recover. To this the defendant excepts.

The exception is well founded: for the doctrine of the presumption of grants to easements from long possession, has no application to this case.

When one continues in the uninterrupted possession of land for thirty years or enjoys the use of a franchise for twenty years, a grant is presumed. So, if one erects a dam and ponds back water upon the land of another, and is allowed to keep it there, for twenty years, a grant of the easement or privilege of doing so is presumed; and so in many similar cases. But to make this doctrine applicable, two things are necessary. There must be a thing capable of being granted: and there must be an adverse possession or assertion of right: so as to expose the party to an action, unless he had a grant; for, it is the fact of his being thus exposed to an action and the neglect of the opposite party to bring suit, that is seized upon, as the ground for presuming a grant, in favor of long possession and enjoyment, upon the idea that this adverse state of things would not have been submitted to, if there had not been a grant.

Where one erects a dam on his own land, and another, who owns land below, incidentally derives a benefit, by availing himself of the protection, which the dam enables him, by means of ditches, to give to his land, which is our case, neither of these essentials for presuming a grant has an existence.

There is nothing capable of being granted: for the one has a right to cut ditches and to protect his land, and therefore cannot acquire such right by a grant, for he has it

already, and the other cannot grant it, for he has not got it to give.

There is no adverse possession or assertion of right, so as to expose the party to an action. The owner of the dam can make no objection; his rights are not interfered with; and the owner of the land below can acquire no new right by simply doing what everybody admits he has a perfect right to do and what nobody has any right to oppose.

We think his Honor erred, in holding that the plaintiff had by his long enjoyment acquired an easement or right to have the dam kept up, which is the ground upon which the case was put, in reference to which the damage was found and to which the defendant excepted. We do not feel called upon to decide any other point.

PER CURIAM. Judgment reversed and *venire de novo*.

JOSEPH AREY v. DAVID STEPHENSON.

A promise of a party that he will settle with another will only take a claim out of the statute of limitations, when it clearly appears that the promise referred to that particular claim.

The cases of *Smith* v. *Leeper*, 10 Ire., 86: *Peebles* v. *Mason*, 2 Dev., 367, and *Smallwood* v. *Smallwood*, 2 Dev. & Bat., 330, cited and approved.

Appeal from the Superior Court of Law of CUMBERLAND County, at a Special Term in February, 1850, his Honor, Judge *Ellis*, presiding.

The action is assumpsit for money paid for the defendant, and was brought in October, 1839. Pleas, non-

assumpsit, and statute of limitations. The plaintiff proved, that in 1830 he paid to one Murphy the sum of $70 for the defendant: and he further examined one Jennings, as a witness, who stated that, shortly after this suit was brought, he was in Mobile, in Alabama, (where the defendant then resided,) and received a letter from the plaintiff, written from Fayetteville, in this state, which he showed to the defendant, who read it and flew into a passion and said, "I will not settle with you: but I am going to Fayetteville shortly, and will settle with Mr. Arey himself." The witness did not produce the letter, and was unable to state its contents; but he said further, that the defendant and he had other talk at the time, and he thought the Murphy claim was mentioned in their conversation.

The court instructed the jury, that the action was barred, unless it was taken out of the statute of limitations by the testimony of Jennings; but that, if they believed the words spoken by the defendant to Jennings referred to the claim in suit, they amounted to an acknowledgment of it as a subsisting debt, and the statute would not bar. The jury found for the plaintiff, and the defendant appealed from the judgment.

W. Winslow, for the plaintiff.
Strange, for the defendant.

RUFFIN, C. J. The court would concur in the opinion given to the jury, if the contents of the letter, to which the defendant referred, sufficiently appeared, so as to enable us to see, that the defendant intended to promise to settle this claim. The case would then be similar to that of *Smith* v. *Leeper*, 10 Ire., 86, in which the promise was to settle an account that had been before stated and was then shown to the defendant. That circumstance defined and limited the language of the party, so as to make it

applicable to a certain debt, then in the contemplation of the person, and to that only, as in all fairness and justice it should be. It was, in terms, to settle the particular debt appearing upon the account before the parties. But it is entirely otherwise in the present case. Nothing appears here, except that a letter from the plaintiff to the witness was shown to the defendant, and the defendant, after reading it, said, he would settle with the defendant. Settle what? Why, it could only be the matter mentioned in that letter. What was that? We are uninformed. It is but a bare conjecture, that it may have related to this demand; and that is too vague to authorize an inference, that the promise was in fact to pay this very debt. It is impossible to understand the language used by the defendant without some colloquium: for, "I will settle with Mr. Arey" is in itself senseless. That is not furnished here, for the want of a knowledge of the subject of the letter. The subsequent part of the testimony of the witness is equally unsatisfactory. He could not remember certainly, that "the Murphy claim," as he calls it, was mentioned in the conversation, though he thought it was; but he does not tell us what was understood by that description, nor does he say what was said in relation to it, much less that the defendant agreed to settle that claim. Such loose language is unfit to go to a jury as evidence of a promise to pay a debt, for which the party was not before bound. It would virtually take away the protection, which the legislature meant to give against stale demands. The present case seems clearly to fall within the rule laid down in the previous ones of *Peebles* v. *Mason*, 2 Dev., 367, and *Smallwood* v. *Smallwood*, 2 Dev. & Bat., 330.

PER CURIAM. Judgment reversed and a *venire de novo*.

DEN ON DEMISE OF BENJAMIN HARRIS v. NANCY Y. DEGRAFFENREID.

Under our act of Assembly a man cannot be held to be a purchaser for a valuable consideration, who gives for the land not more than one-half or two-thirds of the value.

Although one of the debts inserted in a deed of trust to secure several creditors be fraudulent, yet the legal title passes to him and his sale to a third person is valid.

The case of *Brannock* v. *Brannock*, 10 Ired., 428, cited and approved.

Appeal from the Superior Court of Law of CHATHAM County, at the Spring Term, 1850, his Honor, Judge *Battle*, presiding.

Joseph J. Rives was seized of a tract of land, containing about 170 acres, and, on the 6th day of December, 1847, he conveyed it by a deed of trust to Samuel H. Crutchfield, to secure certain sums of money therein mentioned, as due from Rives to sundry persons. The deed recited that Rives was indebted to James Perry in the sum of $302.85, due upon three bonds dated December 3rd, 1847; also to John McPherson in the sum of $44.13, upon a bond given May 28th, 1847; also to Marsh & Co. in the sum of $38 and interest, on a judgment rendered by a Justice of the the Peace; and to Robert Love in the sum of $16, on a judgment of a Justice of the Peace; and that he was desirous to secure the payment of those debts. The deed then purports, in consideration of the premises, and of the sum of one dollar paid to Rives by Crutchfield, to convey

the land in full to Crutchfield, upon trust, that, if the several debts should not be paid and satisfied on or before the 1st day of January 1848, the trustee should sell the premises at auction to the highest bidder for ready money, and out of the proceeds pay the debts or such sums as might then be due thereon. The deed was executed by Rives and Crutchfield, and was proved on the 6th and registered on the 7th of December, 1847.

On the 13th of December, 1847, Rives sold and conveyed to Harris, the lessor of the plaintiff, one hundred acres of land, parcel of the above tract, at the price of $200, which Harris then paid. Evidence was given that the same was worth at the time from $300 to $400.

On the 31st of January, 1848, Crutchfield, in pursuance of the terms of the deed, exposed the whole tract of land for sale to the highest bidder, and the defendant became the purchaser at the price of $480.50, then paid down, and took a deed from the trustee. Evidence was given that the value thereof was $500 or $600.

The plaintiff alleged that the deed of trust was made with the fraudulent intent to delay and hinder the creditors of Rives, and was therefore void as against the creditors and the lessor of the plaintiff. In support thereof the plaintiff examined the said Rives as a witness; and he deposed, that a large portion of the debt to Perry, mentioned in the deed, was not owing by him and was inserted by an arrangement between him and Perry, with a view to save his land or a part of it for the benefit of his family; that the other debts, mentioned in the deed, were just, and that Crutchfield, the trustee, was not aware of the fraudulent arrangement between the witness and Perry, and was told by them that everything was fair. The plaintiff gave further evidence, that just before the sale by the trustee, a person stated to the defendant, that the plaintiff had purchased a part

of the land, but that he did not think he intended to claim it.

The counsel for the plaintiff thereupon moved the court to instruct the jury, that the deed of trust was fraudulent and void, and that, if the jury believed the witness, the defendant had, at the time of the purchase from the trustee, such notice of the claim of the lessor of the plaintiff, as prevented the defendant from acquiring the title by the sale and deed from the trustee. But the court refused the instruction as prayed for; and told the jury, that, supposing the deed of trust to have been executed with the fraudulent intent imputed to it, yet, if the defendant purchased for a fair price and without notice of such fraudulent intent, the title was good; and that there was no evidence, that the defendant had notice of the alleged fraudulent intent in the execution of the deed. The jury found for the defendant, and after judgment the plaintiff appealed.

Haughton and *W. H. Haywood*, for the plaintiff.

No counsel for the defendant.

RUFFIN, C. J. There seems to have been a singular confusion of matters, entirely distinct in their nature, in the mode of stating the propositions on the part of the plaintiff, at the trial. Although the lessor of the plaintiff was not a creditor, and did not claim under a creditor, of Rives, but was a purchaser from that person after he had made the deed of trust, yet it was insisted for the plaintiff, that the deed of trust was fraudulent and void against the creditors of the maker, and therefore, was void also as to the lessor of the plaintiff. Now, in the first instance, it does not appear, that the deed of trust could have been void as against creditors: since there were no creditors, as far as we see, but those secured in the deed, and, as to them, no fraud can be inferred, as the fund was

ample to pay them all and produced enough for that purpose, even according to the sums set forth in the deed. In the next place, it does not follow that the deed of trust would be void as against Harris, although it might have been fraudulent as to certain creditors of Rives; for, although the same facts, which make a deed fraudulent under the 13th Eliz., as to creditors, may, generally speaking, render it fraudulent also under the 27th Eliz., as against a purchaser, yet it is clear, that a deed is not fraudulent as against a purchaser, merely because it was so as against creditors. Since our act of 1840, c. 28, that is so beyond all doubt; for by that act, no person can be held to be a purchaser except he purchase for full value, and without notice of the prior conveyance, which he impeaches as fraudulent. The distinction is very material; and its existence probably accounts for the effort on the part of the plaintiff to put his lessor's claim upon the merits of supposed creditors of his vendor and not upon his own merits as a purchaser: since, however this might have been deemed a purchase at a fair price, according to the old law, *Fullenwider* v. *Roberts*, 4 Dev. and Bat., 488, it is certain that under our late act, one cannot be held to be "a purchaser for the full value, who gave not more than one-half or two-thirds of the value. His Honor was, therefore, not only right in not giving the directions prayed on the part of the plaintiff, but might properly have told the jury, that the deed of trust was not void as against the lessor of the plaintiff, upon the ground that it was made with an intent to defeat creditors of the maker or purchasers from him, inasmuch as the plaintiff did not bring his lessor within either of those classes of persons; and therefore the deed of trust was good as against him as much as against Rives himself. That consideration alone would have put an end to the title under which the plaintiff claims, and required the verdict to be rendered for the defendant.

But the Court holds, that the defendant was entitled to a verdict upon the other ground, that the legal title vested in the trustee, in virtue of the separate trusts in favor of the several real creditors secured in the deed, according to the principle laid down in the recent case of *Brannock* v. *Brannock*, 10 Ired., 428; there being no imputation of collusion between them or the trustee and the other parties, Rives and Perry. That case shows that, whatever relief Harris might have in another forum, out of the fund applicable to the debt of Perry under the deed, by reason of the fraud and illegality of the trust for that debt, yet the title of the trustee was not thereby avoided at law. Consequently, the conveyance of the trustee to the defendant must likewise be effectual at law. Of course, the defendant's purchase could not be affected by notice of the claim of Harris, if there had been the most direct and sufficient evidence of notice: inasmuch as the title of Harris was intrinsically defective, being posterior to the deed of trust and not for full value, and consequently, notice of it could not impart to it new validity.

PER CURIAM. Judgment affirmed.

HENRY H. SMALL v. HARMAN EASON.

An overseer of a public road has no right, at his discretion, to widen the road. This can only be done by a jury under the direction of the county court.

Appeal from the Superior Court of Law of BEAUFORT County, at a Special Term in January, 1850, his Honor, Judge *Battle*, presiding.

The plaintiff was the overseer of "a public road leading from Singleton's to the town of Washington," in Beaufort county, and this is a warrant by him for the penalty given by the 10th Section of the Revised Statutes, ch. 104, for neglecting to send a hand to work on the road. On the trial in the superior court, on *nil debet* pleaded, the case was this: The defendant carried his hands to the road at the time appointed, and found the plaintiff engaged in cutting and grubbing bushes on each side of the road, so as to widen it from twenty to thirty or thirty-five feet. He then enquired of the plaintiff, whether he intended to make the road that width all the way to Washington, and the plaintiff told him, he did. Thereupon the defendant stated to the plaintiff, that he was willing his hands should remain and work on the road to the width of twenty feet, but that they should not work outside thereof, to the greater width of thirty, or thirty-five feet. For that refusal and failure this suit was brought.

The counsel for the defendant insisted, that the plaintiff had no right to require the hands to clear the land or

do work to a greater width than the road then was, for the purpose of widening it to the extent mentioned: and therefore that the defendant did not become liable to the penalty by refusing to work for that purpose. But the court instructed the jury, that the overseer had a discretionary power to make the road of greater width than twenty feet, when he deemed it necessary: and therefore that the plaintiff had the right to widen his road to the dimensions mentioned, and was, consequently, entitled to recover. From a verdict and judgment against him the defendant appealed.

No counsel for the plaintiff.
Biggs, for the defendant.

RUFFIN, C. J. In the 14th section of the statute concerning roads it is enacted, that "all roads laid off under the provisions of the Act, shall be deemed public roads, and shall be at the least twenty feet wide"—with other provisions, that where the overseer may deem it expedient to make causeways, they shall be at least fourteen feet wide, and the earth be taken equally from each side to cover them, and that the overseers shall have all stumps and runners cut and completely cleared for the width of sixteen feet in the centre of the highways. The enactment, therefore, is positive, that roads must be laid out so as to be twenty feet wide; and from the terms "at the least," it follows, that the width of the road may be more or less, and that twenty feet is to be the minimum. A provision for roads of greater dimensions than the minimum mentioned is most reasonable, as the great highways of the country and those near large towns ought to be of more spacious dimensions than such as are less used. The question, however, on which the case turns, is, by whom and in what manner the width of a road is to be determined?

There seems to be strong and decisive objections to leaving it to the discretion of the overseer. What is the public road ought not to be varying and uncertain, but determinately fixed in some authentic manner. That is requisite, as well in order to ascertain the quantity of land which the public appropriates to its use, and the measure of compensation to the proprietors, as to determine the powers and duties of the overseer and the hands. An overseer, for example, is liable to indictment for suffering any part of his road to be out of repair. But, when a road has been laid off by a jury twenty feet wide and opened accordingly, it could not be maintained that, because an overseer should clear ten feet on each side, he thereby legally took the additional land from the owner and converted it into highway and subjected himself and his successors to prosecution for not keeping the addition, as well as the original road itself, in repair. And it would seem clear, that the overseer could not compel his hands to work on any place, unless he could be indicted for not clearing or repairing the same place, as a part of the public highway. Besides, a discretion to enlarge from time to time involves also a like discretion to diminish the dimensions of the road: and the latter clearly could not be tolerated, since it would put it in the power of the overseers to contract a road, though it lead to a great market town and had been laid off thirty or forty feet wide, as required by the public convenience. It is plain, therefore, that it would not be fit to invest overseers of the roads with a discretion so arbitrary and fluctuating, and one which might practically produce so many mischiefs. Accordingly, upon recurring to the statute on this subject, it is found that it does not vest such a discretion in the overseer, and that its provisions require the track of the road, necessarily including its dimensions, to be judicially established. The first and second sections give power to the county court to order the laying

out of public roads, where necessary; and the fourth section enacts, that "all roads, to be hereafter laid out, shall be laid out by a jury of freeholders—which laying out, and such damage as private persons may sustain, shall be done and ascertained by the jury on oath." The terms, "lay out the road" and "lay off the road," import that the jury should not only fix the course of the road, as passing particular points, but also designate it, after the manner of a survey, by its lines: in other words, lay down the whole ground covered by the road, or specify its width. For, when it is said, that every road shall be laid out by a jury, and shall be so laid out as to be at least twenty feet wide, it is made the duty of the jury, upon their own judgment or under the order of the court, to lay it out of that or such greater width as to the court or jury may seem fit. The inquisition, being returned and sanctioned by the court, concludes the overseer and hands, as it does the rest of the community. It is supposed not to be common for the jury to specify the width of the road, so that it can be seen on the face of the report; and the usual course is to stake or otherwise designate the ground by marks, and refer to them in the report, so as to enable the overseer to identify the intended track of the road and open it accordingly. The appropriation of that line of road, by opening and using it as such, would subsequently sufficiently establish it to be the true line, as laid out by the jury, and constitute the public road. But if the inquisition should omit the width it would not follow that it was void; but the road would be established, as ordered by the court and reported by the jury, and be deemed of the width of twenty feet along the prescribed line, since it must, by law, be of that width at all events, and there is no other limit in particular, to which it can be carried. The proceedings, by which this road was laid out, were not given in evidence, and probably were not necessary. The exception states it as a fact, that it

was a public road. It is taken, therefore, to have been duly laid off by a jury, and upon the grounds mentioned, to have been laid off twenty feet wide. Indeed, it is apparent, from the statement of the facts and the form of the prayer for the instructions, that, probably for a long time and up to the period of this controversy, it had been used and worked on as a road of that width. To that extent the defendant was bound and willing to work in repairing it; but the overseer did not wish that, and insisted on employing him in extending the road from its original width of twenty feet to thirty-five feet. That he had no right to do: and, as the defendant was only bound to work the public road, he incurred no penalty by refusing to work on what was not a part of the road. It may be said, that the public convenience may require that a road, though sufficient for public uses when laid off, should be made wider than twenty feet; which is certainly true. But, when a necessity of that kind arises, application must be made to the court and a jury ordered to lay it off again, of the requisite dimensions. An overseer ought not to be allowed of his own head to encroach on private right, or to diminish his own responsibilities, by enlarging or lessening a public highway, as legally established.

PER CURIAM. Judgment reversed and *venire de novo.*

HARRY NICHOLS v. RICHARD P. FREEMAN.

A vendee, by contract for the sale of a tract of land, can maintain an action upon the bond for title, without having made a payment or tender of the whole of the purchase money, when, by a sale of the property, it is put out of the power of the vendor to make the conveyance, at the time the vendee has a right to call for it.

And it makes no difference, whether the vendor himself has made the conveyance, or whether it has been made by a sheriff under process of law.

In such a case, the measure of damage is the difference between the real value of the property at the time of the breach, and the amount of the purchase money, remaining unpaid.

Appeal from the Superior Court of Law of BERTIE County, at the Fall Term, 1849, his Honor, Judge *Manly*, presiding.

Smith and *A. Moore*, for the plaintiff.
Bragg, for the defendant.

PEARSON, J. On the 1st day of January, 1841, the plaintiff purchased of one Sutton "the town lot, house, and furniture" in the town of Windsor, at the price of $8,000, and to secure the payment thereof, executed three notes for $2,666 each, falling due on the 1st of January, 1742, '3, '4, and drawing interest from date, and on that day was let into possession. At the same time, Sutton, with the defendant as his surety, executed to the plaintiff a penal bond in the sum of $10,000. The condition, after reciting the contract, the execution of notes for the purchase money, and that the plaintiff was let into possession, but that the title was to be held by Sutton, as a further security for the purchase money, is in these words: "Now, if the said Nichols, or any other person for him,

shall well and truly pay the purchase money, and the said Sutton thereafter, upon being requested, shall refuse to execute a good and sufficient deed, with covenants of seizin and warranty, to the said Nichols, his heirs and assignees, for the above mentioned property, then the obligation to be in full force, otherwise to be void."

The action was commenced in March, 1848, and is for a breach of this bond. The breach assigned is, that on the 8th of May, 1843, the lot, house, and furniture were sold by the sheriff, under executions against Sutton, issuing upon sundry judgments, rendered against him, at August term, 1842, of the county court of Bertie; by reason of which sale, the said Sutton was disabled, and so continued until his death, and his heirs and administrator have ever since been disabled and incapable to convey the property, according to the true intent and meaning of the bond. The declaration has several counts, setting out the breach in different ways.

It was admitted, that the sheriff sold the property and made a deed to the purchaser, who evicted the plaintiff in March, 1845. In January and February, 1841, the plaintiff made payments amounting to $6,552.78. Sutton died in December, 1843, intestate and insolvent, leaving several infants his heirs. The value of the property at the time of the sale by the sheriff was $2,500. It was also admitted, that the plaintiff had not tendered to pay the balance of the purchase money; and in August, 1841, he conveyed his interest in the lot, house, and furniture, in trust, to secure certain of his creditors, whose debts still remain unpaid.

And it was agreed, that if his Honor was of opinion, that the action could not be maintained, a nonsuit should be entered; otherwise, judgment to be entered for the penalty of the bond, to be discharged by the payment of $8,060.25, if his Honor should be of the opinion, that the

proper measure of damage was the amount which had been paid by the plaintiff, less the rent of the property, while the plaintiff was in possession (from January 1st, 1841, to 8th of May, 1843, the date of the sheriff's sale); or of the sum of $207.80, with interest from the 8th of May, 1843, if his Honor was of opinion that the proper measure of damage was the difference between the value of the property at the time of the sheriff's sale and the balance of the purchase money remaining unpaid with interest; or of six pence, if his Honor was of opinion that the plaintiff was only entitled to nominal damage.

His Honor was of opinion, that the action could not be maintained. A nonsuit was entered, and the plaintiff appealed.

Two questions are presented. Can a vendee, without making a tender of the balance of the purchase money, maintain an action upon a bond for title, on the ground, that by a sale of the property, it is put out of the power of the vendor to make the conveyance at the time the vendee has a right to call for it?

Lovelock v. *Franklin*, 55 C. L. R., 372; *Bondel* v. *Parsons*, 10 Each., 359; Coke on Littleton 221, and the other authorities cited by the plaintiff's counsel, fully support the position for which he contends. In *Lovelock* v. *Franklin*, the defendant had put the plaintiff in possession of the house, at an annual rent, and had agreed to convey the absolute interest to him, at any time within seven years, on payment by him, at any time during the seven years, of the sum of $1,406. The defendant, during the seven years, sold and conveyed the premises to a third person, and the action was brought before the expiration of the seven years and without a tender of the $1,406. The Court held, that the defendant had broken his contract by making the conveyance, and that the action could be maintained without a tender; for, as the defendant had put it out of his power to make the conveyance, a performance on the part

of the plaintiff was dispensed with, and it would have been a "vain and foolish" thing to make the tender.

In that case, the action was brought before the expiration of the seven years; and it was urged, that there was no breach, for the defendant might recapacitate himself to make the conveyance, by purchasing back the property, before the time ran out; but the Court held, that there was a breach, for the defendant had incapacitated himself at the very time, when he might be called on and should be ready.

In this case, from the terms of the bond, we think that the plaintiff was at liberty to pay the money at any time and call for a title before his last note became due; for the credit was given for his benefit, and he might waive it, and pay sooner and stop interest: and the defendant was to convey upon the payment of the purchase money, for which purpose, alone, the title was retained. This action was not brought until the last note fell due: and admitting that the defendant might have recapacitated himself by a repurchase before that time, it is sufficient to say, he failed to do so, and was incapacitated at a time when he "might be called on and should be ready."

The defendant's counsel, admitting the general principle, insisted that this case did not come within it, on three grounds: 1st. The plaintiff, before the sheriff's sale, had conveyed all of his interest in the property to a trustee, who had a right to call for the title. The answer is: the legal interest of the plaintiff in this bond still continues. Whether he carries on this action for his own use or for the use of another, is beside the case. This Court must act upon legal rights and has no concern with equities.

2nd. It does not appear that the plaintiff was able to pay the balance of the purchase money on the day it fell due, and it is to be inferred, from his making an assign-

ment to pay the debts, which are still unpaid, that he was not. So he *first* became incapacitated and has no right to complain that the defendant was *afterwards* equally unfortunate. This objection is fully met in the case of *Lovelock* v. *Franklin*. The plaintiff was not *bound* to pay until his last note fell due. The defendant was bound to convey sooner, if the money had been tendered: and as he was incapacitated from doing so, a performance on the part of the plaintiff is dispensed with, and the enquiry whether the plaintiff *would have* been able to pay the balance of the money, is precluded.

3rd. The incapacity was not caused by the act of the defendant, but by the act of law. The sheriff's sale was in "*invitum*" on the defendant's part. Several cases were cited, which show, that conditions not to assign or underlet leases, were not broken by an assignment under the bankrupt and insolvent laws. Those cases are all put upon a strict construction of the terms of the condition; and it is admitted by them, that if the terms of the condition are made broad enough to include assignments by force of the laws referred to, such an assignment would be a breach, although made by an act of law, and in "*invitum*." In our case, the terms are broad enough. The defendant is to convey on payment of the purchase money. It makes no difference, so far as concerns the plaintiff, whether the inability is caused by a conveyance, made by the defendant or the sheriff, to pay his debts.

The second question is, as to the measure of damage.

We cannot yield our assent to the position assumed by the plaintiff, that he has a right in this action against one of the obligees, for a breach of a bond for title, to recover, as damages, the amount of the purchase money, which had been paid in the same way, as if the plaintiff had repudiated the contract and sued the vendor for money, "had and received to his use."

In this action, the plaintiff does not repudiate the contract; but seeks to recover compensation in damage for its non-performance; and the question is, what damage has he suffered? What sum will put him in as good a condition as if the contract had been performed? In that event, he would have got a property which is worth $2,500, but he would have been forced to pay the balance of the purchase money and interest. He has not paid this latter amount, and his damage is, the difference between that sum and the value of the property; which, by the case agreed, is $207.80, with interest from the 8th of May, 1843. This gives the plaintiff his redress at law, by compensation in damages, which he has elected to pursue as his remedy. He had the right to file a bill in equity for a specific performance, and the decree would have been for a conveyance of the property, upon his paying the balance of the purchase money, with interest. He would not have been entitled to a decree for the amount of the purchase money, which he had paid; and there is no principle, upon which he can recover it, in this action upon the bond.

The only difference between his remedy at law and in equity upon the contract, is, that in the one count he gets the property by paying for it: in the other, he gets compensation in damages, which is the difference between the value of the property and the amount of the purchase money, remaining unpaid.

Our attention was called to the fact, that in the action for a breach of a covenant of quiet enjoyment, the measure of damage is, the price paid for the land, which is taken, as between the parties, to be the true value; and it was urged that $8,000 should be taken as the value in this case, and not $2,500, which is admitted to be the real value, at the time of the breach.

The analogy does not sustain the position, for which it was invoked; because the rule of damage in that action is founded on peculiar reasons. The covenant of quiet

enjoyment is a substitute for the old *real warranty*, the remedy upon which was by voucher, and if the demandant recovered, the tenant had judgment against the vouchee for other lands of equal value. This remedy could only be used in real actions, where the *land* was demanded. After the action of ejectment took the place of those actions, the courts, to give effect to the warranty, were obliged to construe it into a covenant of quiet enjoyment; but allowed the new action to retain some of the peculiarities of the remedy for which it was substituted—among others, that of considering the price as the rule of damage in lieu of "other land of equal value." *Williams* v. *Beeman*, 2 Dev., 483.

There is nothing peculiar in the present action; and the general principle applies, that the plaintiff shall recover compensation for the injury which he has sustained

The judgment of the court below must be reversed, and judgment be entered for the plaintiff for $10,000, to be discharged by the payment of the sum of $207.80, with interest from the 8th of May, 1843, according to the case agreed.

PER CURIAM. Judgment accordingly.

WILLIAM H. GILLIAM v. WYATT CANADAY.

The owner of land, injured by the erection of a mill, who has proceeded by petition, under which the annual damage assessed is as high as twenty dollars, and who has taken judgment for, and received the damage for, the whole five years, cannot maintain an action on the case, brought after the expiration of the five years, without having again ascertained the annual damage by proceeding under a second petition.

Appeal from the Superior Court of Law of GRANVILLE County, at the Fall Term, 1848, his Honor, Judge *Caldwell*, presiding.

Gilliam and *Graham*, for the plaintiff.

H. W. Miller, *McRae*, *T. B. Venable* and *W. H. Haywood*, for the defendant.

PEARSON, J. In 1835, one Taylor filed a petition against the defendant, under the Act of 1809, to recover damages for the injury done to his mill and premises, by the ponding back of water by the mill dam of the defendant, so as to obstruct the plaintiff's wheel and otherwise injure his premises; and in 1838 a verdict was returned in his favor, assessing the annual damages at the sum of $20, and a judgment was thereupon rendered for the sum of $20, annually for five years, commencing in August, 1834. It was admitted that the defendant had satisfied this judgment, and paid the last installment in August, 1839.

In 1841, Taylor sold his mill and land to the plaintiff, who commenced this action on the case in 1845.

The defendant insisted, that the action could not be maintained, as Taylor had received the damages for the

five years, and the plaintiff had not proceeded by petition to ascertain the annual amount of damage done to him.

His Honor decided that the action could not be maintained.

It is clear that the plaintiff, as assignee, "stands in the shoes" of Taylor, and is entitled to his right to sue, so far as it is affected by the statute. "The right runs with the estate," like certain covenants, which follow the estate as incidents.

The broad question, then, is presented: can the owner of land, injured by the erection of a mill, who has proceeded by petition, under which the annual damage assessed is as high as $20, and who has taken judgment for, and received the damage for, the whole five years, maintain an action on the case, brought after the expiration of the five years, without having again ascertained the annual damage by proceeding under a second petition? We think, by a proper construction of the statute, he cannot.

At common law, one whose land was injured to the smallest amount, had it in his power to issue a new writ every day, and was entitled to recover at least nominal damages in every one of his actions. This would carry costs, and he could break down his adversary, not by the amount of damages, but by the amount of costs.

The act of 1809 was passed to remedy this evil, in favor of the persons erecting mills, and the *controlling idea* of that statute is, to prevent an action on the case from being brought against the owner of a mill unless it be first ascertained, by verdict of a jury, that the annual damage, *during the time for which such action is to be brought*, amounts to $20 at the least.

To effect this purpose, the verdict is made binding for five years. If the annual damage is less than $20, the action cannot be brought. But if it is as high as $20, the action is allowed; and in that event the verdict and judg-

ment thereon are only binding for the year's damage preceding the filing of the petition. So that, when the action is brought, it is for injury done during the four years, as to which it has been ascertained that the annual damage is as high as $20.

But suppose instead of taking one year's damage and then bringing his action, the party receives the whole damage and brings his action after the expiration of the five years. He cannot declare for the injury done during the four years, because he has been satisfied for that. He must therefore declare for the injury done afterwards—that is, during a time, as to which the verdict is not binding, and during which it is not ascertained, whether the annual damage amounts to more or less than $20, which would be a plain violation of the controlling idea of the statute.

The correctness of this construction is crnfirmed by this additional consideration. When the action is brought, the statute contemplates that the plaintiff shall receive the annual damage for one year only. Now, if he receives the damage for the whole five years, he has, by his own act, made it possible for this provision of the statute to take effect, and has no right, against the very words of the statute, to receive the damage for the whole five years, and bring his action also.

As an argument against this construction, it was insisted for the plaintiff, that, if the proceedings, under the petition, pended for more than five years, as is not unfrequently the case, the action could not be brought without another petition, which might also be protracted for more than five years, and to the action would be wholly defeated. There is more plausibility than force in this argument. For, consistently with this construction, the action can be brought after the expiration of the five years, supposing the proceedings to have pended that long, and the injury sued for is the damage done during the four

years, as to which the annual damage has been ascertained. If the plaintiff is allowed to add the time from the expiration of the four years to the issuing of the writ, as to which the damage has not been ascertained, it is a departure from the principle of the statute, made necessary by the action of the courts. But it is not such an absolute and total departure from it, as the plaintiff asks to be allowed to make, when he seeks to recover for a time, as to no part of which the damage has been ascertained in the manner required by the statute, and the necessity for which is the effect, not of the slow action of the courts, but of his own act, in receiving satisfaction for the whole time.

It is a *condition precedent* to the action, that the annual damage, during the time for which it is brought, shall be first ascertained to be as high as $20. This action is for damage between the years 1841 and 1845, and there is no telling whether the annual damage during this time was as much as $20. Many changes have taken place since the rendition of the verdict in 1838, and the fact has not been ascertained in the mode required by the statute. The plaintiff's case is not within its words or its meaning. If he can maintain this action, he can maintain fifty more, and break the defendant down with costs; for there is no provision, that a nonsuit shall be entered or that the plaintiff shall not recover costs, if it turns out on trial, that the annual damage is less than $20. The protection, intended to be given to the owners of mills, can only be secured to them by the construction we have adopted.

The judgment of the court below must be reversed and there must be a *venire de novo.*

PER CURIAM. Judgment reversed and *venire de novo.*

THE STATE, on the relation of Lemuel Williams, et al. v. WILLIAM BRITTON'S ADM'R, et al.

The next of kin cannot maintain an action on the administration bond, after the death of the administrator, because he failed to take into his possession, and distribute, certain negroes to which his intestate was entitled. These negroes pass to the administrator *de bonis non*, and are to be by him distributed.

The cases of *Taylor* v. *Brooks*, 4 Dev. & Bat., 143, and *State* v. *Johnson*, 8 Ired., 381 and 397, cited and approved.

Appeal from the Superior Court of Law of BERTIE County, at the Spring Term, 1850, his Honor, Judge *Ellis*, presiding.

This was an action of debt on a bond executed by William Britton, with the defendants as his sureties, upon his obtaining letters of administration upon the estate of one Hodges Harrel. The breach assigned was, that Britton wrongfully delivered the slaves to the widow, instead of making distribution of them among the next of kin of the intestate.

It was in evidence, that Hodges Harrel died in January, 1838, and, at the ensuing February term of the court of pleas and quarter sessions of Bertie county, letters of administration were committed to William Britton, who gave the bond, upon which this suit is brought. It was proved that the wives of Williams and Cox were the children of the intestate, and the other relators were the children of another daughter by the same mother; and they, with the widow and her children, were the only persons who were entitled to distribution of the estate of Harrel. A negro, Lucy, was bequeathed by John Acre, to his daughter, Patience Harrel, wife of the said Hodges

Harrel, in 1814; which negro was delivered, by the executor of Acre, to Hodges Harrel. Lucy had a child by the name of Ann, who is now the mother of five children. These negroes were in the possession of Harrel, at his death, and continued among his assets, when Britton became his administrator. It was proved, that Harrel sometimes threatened to sell these negroes: at other times, he spoke of them as belonging to his wife, and expressed a wish to sell them, if his wife would agree to it, as he thought it was hard he should have to raise negroes for other persons. Britton, after he administered upon the estate of Harrel, never took the negroes into his possession, but let them remain in the possession of the widow. At the time of the sale of the perishable part of the estate of Harrel, which took place shortly after his qualification, Britton said, he should have nothing to do with the negroes, as they, under the will of John Acre, belonged to the widow for life. Britton died in 1845, having, before his death, settled the estate of Harrel.

His Honor, Judge *Ellis*, intimating the opinion, upon the foregoing statement of facts, that the action could not be maintained, the plaintiffs, in submission thereto, suffered a nonsuit.

Rule for a new trial. Rule discharged. Judgment and appeal.

Bragg, for the plaintiff.
A. Moore, for the defendant.

PEARSON, J. The only question presented in this case is, can the next of kin maintain an action on the administration bond, after the death of the administrator, because he failed to take into his possession, and distribute, certain negroes to which his intestate was entitled?

His Honor was of opinion that the action could not be maintained, and we fully concur with him.

Taylor v. *Brooks*, 4 Dev. and Bat., 143 ; *State* v. *Johnson*, 8 Ired., 381 and 397, are in point and settle the question.

The name "*administrator de bonis non*" explains itself. That officer is to take charge of all the estate, which has not been administered ; and is to finish whatever has been left undone by the first administrator. Assets are administered by taking them into possession and paying them over to creditors, or to the next of kin, in the course of distribution. Both acts must concur, before the goods can be said to have been administered. In regard to the negroes, which are the subject of controversy in this suit, neither act has been done, and they are, to all intents and purposes, *unadministered*.

PER CURIAM. Judgment affirmed.

ANDREW DUKE v. SOLOMON ASBEE.

A person, who, on the day of, or previous to, an election, furnishes liquor, either at the request of a candidate or any other person, with a belief that such furnishing of liquor is for the purpose of influencing the electors, cannot recover his account against the person ordering the supplies, because the contract is against good morals, and the purity of elections, and because such conduct is prohibited by our statute law.

Appeal from the Superior Court of Law of CURRITUCK County, at the Spring Term, 1850, his Honor, Judge *Ellis*, presiding.

DUKE *v.* ASBEE.

This was an action of assumpsit upon an account.

The plaintiff was introduced as a witness under the book-debt-law, and testified, that in the summer of 1849, the defendant was a candidate for the office of superior court clerk for the county of Currituck, and that the plaintiff retailed spirituous liquors in the said county: That the defendant, during the canvass between himself and the present incumbent, requested of the plaintiff repeatedly to let him have and to furnish his friends, upon public occasions, what liquor and other articles in the said account enumerated, by the small measure or otherwise, they might desire: That, upon the call of Mr. Asbee, previous to the election day, for liquor and other articles for himself and friends in the election, he set out accordingly as he or they may have requested. At other times, when the defendant was not present, according to a previous understanding with the defendant, and upon the call of his friends in the election, he furnished them with liquor, and all of which was drunk on public grounds at public gathering places; and the plaintiff had engagements of the like kind with other candidates, during the said election year, and, under the said engagements, furnished them and their friends with liquor in the like way: That the plaintiff furnished to all persons indiscriminately, who called upon him in the names of the candidates liquor, &c., under the arrangement aforesaid, both before the election and on the day thereof.

The plaintiff further swore that he did not deal out the liquor, &c., as above stated, with any design of influencing the election, and did not vote for the defendant. The plaintiff here closed his case: and the defendant insisted, that the plaintiff was not entitled to recover, because the contract was against good morals and therefore void, upon the ground that treating at elections was prohibited by statute and a penalty annexed.

The defendant then insisted, that treating at elections was prohibited by law, a penalty being attached thereto, and requested his Honor to charge the jury, if the defendant's object was to influence votes at the election, and the plaintiff knew it, then the plaintiff could not recover.

The presiding judge instructed the jury, that if they believed the testimony, the plaintiff was entitled to recover.

The jury returned a verdict for the plaintiff, upon which judgment was given. Rule for a new trial granted and discharged. Appeal to the Supreme Court prayed and granted.

H. Burgwin, for the plaintiff.
Jordan, for the defendant.

NASH, J. In 1801, the legislature passed an act to punish the crime of bribery at elections. Rev. Stat., ch. 52, sec. 23. The preceding section of the act makes it highly penal for any person, who is a candidate for a seat in the legislature, to give, either directly or idirectly, any money, gift, gratuity, or reward, &c., in order to be elected, and embraces all persons who shall do either of the acts "to procure any other person to be elected." The penalty is a forfeiture of four hundred dollars. The 23rd sec. forbids *treating* with either meat or liquor, on *any day of election or on any day previous thereto*, with intent to influence the election, under the penalty of two hundred dollars. The 22nd sec. of the act of 1836 is taken from the 11th sec. of the 16th ch. of an act passed in 1777, and the 23rd was originally passed in 1801. The policy of these two acts is the same with that of the British statute passed in the 7th of William the 3rd, ch. 4th. It is remarkable, that the acts of the general assembly passed in 1760, and the act of 1777 both omit a provision, contained in the statute of William, and a most impor-

tant one, for the suppression of the offences at which they were aimed. The stat. of William, among other acts of bribery, enumerated the giving of "meat, drink, and entertainments, &c." These are omitted in our acts of 1760 and 1777; but the material words embracing them all are brought forward in the act of 1801. I mention these circumstances to show the anxiety, which the legislature has at different times exhibited, to keep pure the elective principle of our government.

The acts of assembly bear so striking a likeness to the English statute, that, although the latter never was in force here, the decisions of the English courts under it are very safe guides to us. The case of *Rebbans* v. *Crickett*, 1 Bos. and Pul., 264, was very similar to the one now under consideration. The 2nd count was for provisions furnished the voters at the request of the defendant, and it decided the plaintiff could not recover, because the contract was *malum prohibitum*, of a very serious nature in the opinion of the legislature, who had drawn a very strict line, which was not to be departed from. This doctrine was affrmed in *Lophouse* v. *Wharton*, 1 Campb., 550, note; nor is it necessary that the person treating should be the agent of the candidate, or act with his knowledge; in either case, he, the person treating, is within the provisions of the statute. *Ward* v. *Nanny*, 3 Car. and P., 399; 14 E. C. L. R., 369. If a mercer sells ribans, knowing that they are to be distributed among voters, he cannot recover the price. *Richardson* v. *Webster*, 3 Car. and P., 128; 14th E. C. L. R., 238; and, so, if a candidate pay the expenses of buying out the freedom of voters or pay their traveling expenses, they incur the penalty of the statute. 1st Sel. N. P., page 12. *Bayntun* v. *Cattle*, 1st M. and Rob., 265. Such have been the decisions of the court under the English Statutes, and they are safe guides to us in putting a construction upon our act, if we need any. The language of the act of 1801, Rev. Stat., ch. 52, sec. 23, is plain and

perspicuous: "If any person shall treat with either meat or drink on the day of election or on any day previous thereto, with intent to influence the election, &c." It is then illegal to treat at any election for the purpose set forth in the act, and if so, a contract, founded on such act, is illegal and void, and cannot be enforced in a court of justice. Whether, therefore, the person who gives the bribe, be a candidate or not, or whether he be the agent of one, or whether or not he acts with the knowledge or consent of a candidate, he incurs the penalty of the act, if his object be to influence the election; and any contract made by him, with *any* person, for payment of such treating, is null and void. No one, on reading this case, can for a moment doubt the intention, with which the treating was done; the testimony comes from the plaintiff. The defendant was a candidate for the clerkship of the superior court of Currituck county, and during the canvass requested the plaintiff to let him have "*and to furnish his friends* on public occasions, what liquor and other articles they might want." Can any one hesitate for a moment, as to the object of the defendant: and can any doubt exist as to the knowledge of the plaintiff of his object and intention? It is true the plaintiff swore *he* had no intention, in furnishing the articles contained in his account, to influence the election, as he voted against the defendant, and as he furnished the opposing candidate and his friends in a similar way. If this were a suit against the plaintiff, to recover the penalty inflicted by the act, it would become important to enquire into his object and intention in furnishing the liquor and provisions; and whether he could escape this responsibility by showing, that instead of pandering to the passions of the friends of one of the candidates, he had furnished his efforts to corrupt those who were opposed to him. For the present, our enquiry is not, whether *he* intended to influence

the election, but whether the defendant did not and whether *he* did not know such to be the fact. The jury were instructed, if they believed the evidence, the plaintiff was entitled to a verdict. In this there was error. They ought to have been instructed, that, if, from the testimony, they believed it was the intention of the defendant to influence the election by the meat and drink furnished by the plaintiff, and that intention was known to the plaintiff, the latter could not recover.

If in England the purity of the ballot box is considered so important, how much more sedulously ought it to be guarded here. Upon the virtue and intelligence of the people our institutions rest; nor can they be endangered, until these principles are lost sight of. The legislature has done its part, and if its enactments are enforced, by those to whom the duty belongs, much may yet be done to give them stability and vigor. And, among the most corrupting practices of candidates for office, is the one we are considering in this case; it is bribery of the most vicious and destructive tendency, and deserves to find no favor, either in courts of justice or from the people themselves. Whenever the offence is known to exist, the law ought to be rigidly enforced.

For the error in the charge pointed out, the judgment ought to be reversed and a *venire de novo* awarded.

PER CURIAM. Judgment reversed and a *venire de novo* awarded.

JOHN CRAWFORD'S ADM'R v. STEPHEN GLASS'S EXE'RS.

Where there is an action on a bond against two obligors, and a non suit is entered as to one, this is no retraxit as to him.

Appeal from the Superior Court of Law of ALAMANCE County, at the Spring Term, 1856, his Honor, Judge *Battle*, presiding.

This was an action of assumpsit brought to recover money, paid by the plaintiff, as surety for the defendants' testator.

On the part of the plaintiff it was proved, that his intestate executed a bond with the defendants' testator to one Morphis, for one hundred dollars. He then produced the record of a recovery against them in Chatham superior court of law, in a suit on the said bond, and proved that he had paid and satisfied in full the judgment and costs. He then introduced a witness, who testified, that, while the suit was pending against the plaintiff, he, the witness, met the defendants' testator, who informed him that he had been to Chatham court to attend to the said suit, that the plaintiff's intestate was his surety, and that his estate should lose nothing by it.

The defendants relied on a former judgment, in favor of their testator, in a suit brought against him, upon the bond in question, and the fact that he had paid it before the suit was instituted against his surety. They produced the record of the suit, in which it appeared, that it was commenced against both the obligors in the bond, but a *nol. pros.* entered as to the present plaintiff's intestate; and, upon the trial upon the issues joined with the present defendants' testator, he had a verdict and judgment in his

favor. The defendants then introduced a witness, who proved the payment of the bond by their testator, before the institution of any suit on the bond. This witness also proved, that when the bond was paid, the holder did not have it with him, but promised to deliver it up to the maker, to be cancelled, in a short time. This he failed to do, but afterward and long after the bond was due, endorsed it to the person, who brought the suits, above mentioned, upon it. The defendants' testator died before the institution of the suit against the present plaintiff.

The plaintiff contended, that, upon showing that his intestate was the surety of the defendants' testator, and that the money was received from him in a suit on the bond, which he had executed as surety, without any collusion on his part, he was entitled to recover what he had thus paid; but at all events he was entitled to recover, if the defendants' testator undertook the management of the suit against the present plaintiff, and managed it so negligently and unskillfully that a recovery was had against him. The defendants contended that their testator was entirely discharged from any responsibility to his surety, by paying the debt, and showing, that in the suit on the bond, he had a verdict and judgment in his favor; and that there was nothing in the plaintiff's testimony to waive that responsibility. They also contended that the entry of *nol. pros.* as to the plaintiff's intestate in the first suit on the bond, was equivalent to a *retraxit*, and that the plaintiff in that suit was thereby relieved from any further action against him.

The court instructed the jury, that the payment of the bond by the defendants' testator, and the verdict and judgment in his favor in a suit against him, upon the bond, was a complete defense against the claim of the plaintiff, though a recovery was afterwards had against him as surety of the

said testator; but that, if the jury believed, that the testator had undertaken the defense of the suit against his surety, and conducted it so negligently and unskillfully that a recovery was had against the surety, then he was responsible for the money so recovered of, and paid by, his surety, and that his death before the termination of such suit made no difference. The court was also of opinion that the *nol. pros.* in the first suit on the bond as to the plaintiff's intestate made no difference.

The plaintiff had a verdict. The defendants moved for a new trial for misdirection to the jury. The motion was overruled. Judgment was given upon the verdict and the defendants appealed.

Norwood, for the plaintiff.
Graham, for the defendant.

NASH, J. The only points, presented by the case, for our review, are the opinions expressed by his Honor below, as to the character and effect of the nonsuit entered as to the intestate Crawford, in the original suit on the note against Glass and himself, and the portion of the charge relating to the management of the suit, in Chatham against Crawford. We concur with his Honor as to the first; the entering the nonsuit, as set forth, was no *retraxit.* Tidd's Pr., 175. 1st Strange, 439. As to the other point we do not agree with him. The charge is "that if the jury believed that the testator, Glass, had undertaken the defense of the suit against his surety, and conducted it so negligently and unskillfully, that a recovery was had against the surety, then he would be answerable for the money, so recovered of and paid by his surety, and that his death, before the termination of the suit, made no difference." There was no evidence of an agency to go to the jury. The declaration of Glass, as stated

in the case, was that he had been to Chatham to attend to the suit against Crawford. Every witness who goes to court to give his testimony in a case, goes to attend on that suit; and his compensation is, by the law, designated to be for his attendance at court. But if there was evidence to show that Glass had undertaken the defense of the suit, there was none to show any negligence in the management of it by him, and surely none, which took place after his death, could affect him. When it was his declaration was made, at what stage of the case, whether at the return term or a subsequent one, we are not informed. He died before the termination of the suit. If he had lived until the trial, no doubt the evidence of his payment of the debt, for which Crawford was his surety, would have been before the jury. This is satisfactorily shown by his declaration, that Crawford was his surety and his estate should not suffer.

PER CURIAM. Judgment reversed and a *venire de novo* awarded.

DEN ON DEMISE OF JOSEPHUS TRIPP v. JAMES POTTER.

On a *scire facias* against heirs to subject the lands of their ancestor, it is too late for them, after they have appeared and pleaded to the *scire facias*, to move to dismiss the proceedings because no declaration has been served on them, although some of the heirs may have been infants.

The case of *Love* v. *Scott*, 4 Ired., 79, cited and approved.

Appeal from the Superior Court of Law of BEAUFORT County, at the Special Term in January, 1850, his Honor, Judge *Battle*, presiding.

Donnell, for the plaintiff.

J. H. Bryan and *J. W. Bryan*, for the defendant.

NASH, J. This action was originally brought against James Potter, and, upon his death, during its pendency, the *scire facias* issued within the time prescribed by the act of 1799, Rev. Stat., ch. 2, secs. 7, 8, 9. Some of the heirs were of age, others were infants. At the return term of the *sci. fa.* the heirs all appeared, the infants by their guardians, we presume, and entered into the common rule and pleaded not guilty. After the suit had been pending for several terms, a motion was made by the defendants, that "the court should make an order, that the suit had abated, because no declaration had been served upon them." This motion was refused by the court. By the act of 1799, it is directed, "that after the death of a defendant, the action of ejectment may be revived, by *serving* on the heirs-at-law, within two terms after his decease, a *copy of the declaration*, together with a notice to the heirs to appear and defend the suit, and, after such service, the suit shall stand revived." To complete the service in such a case, there is no doubt a copy of the declaration must accompany the notice. This was not done, and there was no obligation upon the heirs to appear. But they did appear and made themselves parties defendant, by entering into the common rule. If they had declined to appear, the court, upon the fact being brought to their notice, would have made an order, that a copy of the declaration should be served upon them, or have dismissed the *sci. fa.* and abated the suit; or if the cause had been proceeded in, without their appearance, and judgment entered against them, it would have been erroneous, not affecting their rights. *Love* v. *Scott*, 4th Ired., 79. The defendants came too late; the time was passed for them to make their motion; their appearance cured the defect complained of. There is a proper time

and mode for taking advantages of errors in proceedings. If there has been no process, or if it be defective in point or form, or in its direction, service or nature, the defendant may move to set aside the proceedings for irregularity. But, he cannot, after he has appeared, take advantage of any such error. His application must be made as early as possible, or, as it is commanly said, *in the first instance.* He cannot, when he has overlooked it, or taken subsequent steps in the cause, turn back and object to it. 1st East. 77; 3rd Term R., 7; 1st Tidd's Pra., 161, 162. For the reasons assigned, we are of opinion, that no error was committed. The case of Scott only proves, that, in an ejectment, when the defendant dies, a *sci. fa.* and a copy of the declaration must be served on the heirs, within two terms after the death of the defendant, or the suit will stand dismissed. It is not sufficient to apply for the process within two terms. If the proceeding attempted in this case could succeed, it would be in the power of an heir to come into court, cause himself to be made defendant without any process against him, enter into the common rule and lie by until after two terms have passed, and then throw the case out of court, for the want of a declaration being served as the act directs. This would be a surprise upon the plaintiff and depriving him of a privilege secured to him by the law—that of reviving his suit against the heirs within two terms.

PER CURIAM. Judgment below affirmed.

EDWARD STANLY and Wife v. JOAB WATSON.

An appeal will not lie from the decision of the county court, upon a petition for draining the petitioner's lands, through those of others.

The case of *Collins* v. *Haughton*, 4 Ire., 420, cited and approved.

Appeal from the Superior Court of Law of BEAUFORT County, at the Spring Term, 1850, his Honor, Judge *Bailey*, presiding.

This is a petition in the county court against Murray, Watson, and three others, for leave to drain flat lands, belonging to the plaintiffs, by means of a canal through the lands of the defendants to a certain creek, according to the statute. Murray answered, that he had never prevented the plaintiffs from draining through his land, but, on the contrary, upon being informed of their desire to drain, that he had proposed to unite with them in cutting a canal through his land, in such a way as to enable both of them to drain into it; and that, without giving him any answer thereto, or making any other proposal, the plaintiffs filed the petition. Watson put in a similar answer. The other defendants made no answer or opposition to the prayer. The county court appointed twelve freeholders to go on the premises and examine, whether the canal was necessary, and, if it was, to direct how it should be cut, &c., as prayed for and directed by the statute; and from the order, the parties, Watson and Murray, appealed. In the superior court it was ordered, that the petitioners should have the drain as prayed for, but the same defendants were allowed an appeal therefrom to this court.

Donnell, for the plaintiffs.
Shaw, for the defendants.

RUFFIN, C. J. There seems to be nothing in the objection raised in the answers; for at most it ought only to affect the costs, and they are payable by the petitioners at all events under the statute. Indeed, an agreement between the petitioners and two of the defendants, as to direction and size of the canal through their respective tracts of land, would not be material in respect to the proprietors of the other tracts, and the petition would, therefore, be unavoidable. The statements in the petition are, probably, too vague in respect to the *termini* of the proposed canal, and the ownership and description of the parcel or parcels of land, through which the petitioners desire to drain; and, perhaps, it would be difficult to support a title by means of an inquisition taken under it, without giving it more precision by an amendment. But the Court does not consider that point: since, whether the petition be sufficient or not, the decision of the county court, is not subject to review upon appeal, and the superior court has no jurisdiction to entertain the case upon its merits in point of fact. The case of *Collins* v. *Haughton*, 4 Ired., 420, establishes, that the inquisition must be exclusively under the order of the county court, and that no appeal lies in a case of this sort under the act. Rev. Stat., ch. 40. His Honor ought not, therefore, to have entertained the appeal, but have dismissed it, as having been improvidently allowed. Instead of doing so, however, the court proceeded to determine the merits *de novo* upon the matters of fact and law. In doing so there was error, according to the case cited, and, as we think, the proper construction of the act. The opinion of

the court, therefore, is, that the order of the superior court ought to be reversed. This will be certified to that court, to the end that the appeal be there dismissed and a *procedendo* awarded to the county court.

PER CURIAM. Ordered accordingly.

WILLIAM W. GRIFFIN v. ISAIAH SIMPSON.

Money, belonging to an intestate, used by his widow after his death, must be accounted for by her to the administrator.

Appeal from the Superior Court of Law of PASQUOTANK County, and at the Spring Term, 1850, his Honor, Judge *Ellis*, presiding.

Burgwin, for the plaintiff.
Heath, for the defendant.

NASH, J. The action is in assumpsit, to recover a sum of money, left by the plaintiff's intestate at the time of his death, and, which, it is alleged, came to the hands of the female defendant, and which was used by her. The defense was, that the money, if used by her, was used in burying the intestate and supporting the family, and that not more was left by him than was necessary for those purposes. His Honor instructed the jury, that the defendant, Mrs. Simpson, as the widow of her deceased husband, had a right to use as much of the money on hand, as was necessary to pay the funeral expenses and also

as much as was absolutely necessary for the support and maintenance of the family, until her year's provision was assigned her. The case states that, at the time James Brothers, the intestate, died, he left an ample store of necessary provisions.

We do not concur with his Honor in the view he took of the law in this case. The privilege of a widow, upon the death of her husband, intestate, to interfere with the personal property left by him, is clearly pointed out by the 17th sec. of 121st ch. of Revised Statutes. By that section it is provided, that "she may take into her possession and charge, the whole of the personal estate, and to use so much of the stock, crop and provisions, then on hand, as may be absolutely necessary for the support of herself and family, until administration is granted, when her right to the possession of said estate shall cease." It is by virtue of this statute alone, that a widow is, in this state, authorized to interfere with the personal property of her deceased husband. It is conceived in a spirit of kindness to her and the family, and frees her from the risk of becoming an executor of her own wrong, which any intermeddling with it would otherwise have made her. By the charter of Henry 1st, and by *Magna Charta*, she was entitled to her quarantine, which is the right to remain in the capital mansion house of her husband for forty days, within which time her dower was to be assigned her. Of the personal property no mention is made, nor until the act above recited, originally passed in 1796, was she, in this State, authorized to intermeddle with the personalty. It all belonged to the administrator, when appointed and his letters related back to the death of the intestate. Until such appointment, any person, as well the widow as others, who intermeddled with the assets, except to take care of them, made himself an executor of his own wrong. The act of 1796 made the possession of the widow a rightful one, and invested her with the power

to use a certain portion of the stock, crop, and provisions on hand, for a certain and specified purpose. This right existed until administration granted, and it is made her duty to take out letters, at the next term of the county court, succeeding the death. But the act nowhere authorizes the widow to use the money, which is left; as to it she stands as any other person, and if she does use it for any purpose, she is using money that does not belong to her, and must account for it to the administrator. His Honor charged, that she had a right to use as much of this money, as was necessary to defray the funeral expenses and to purchase such provisions, as were absolutely necessary for the support of herself and family, until her year's provisions were assigned her. The latter branch was uncalled for. From the case it appears, that at the death of Mr. Brothers, the intestate, he left his family amply provided with everything necessary to their comfort. It was not necessary, therefore, for the widow to purchase anything. But the charge was wrong in principle. If there had been a deficiency of crop, stock and provisions on hand, and the widow had used the money of the estate, she would have done what the *law* did not allow. So also as to the funeral expenses. The speedy interment of the body was demanded alike by a decent regard to the opinion of the community, the rights of humanity, and the comfort of the family. And upon whom does that duty more appropriately devolve, than upon the surviving head of the family? But it is a moral and not a legal duty—one of imperfect obligation. Imperfect, so far that the law cannot compel the surviving wife to perform it—and yet so strong, that its neglect would be punished by the universal execration of the community. While, therefore, no voice could be raised to condemn the act of a widow, who uses so much of the money of the estate, as may be necessary to deposit in its resting place the body of her husband, the

law with a stern adherence to the rights of others, disavows the right to do so. She had no authority to make use of the money of the estate. In doing so she became responsible to the administrator, when appointed, and the most she could claim would be to be considered as an executor in her own wrong, in which capacity, her disbursements in discharge of the liabilities of the estate would be allowed her. For, although funeral expenses are not strictly a debt due by the estate, it is a charge upon it, and to be paid as "*opus pium et caritatis*," before any debt or duty whatever. 3rd Coke's Institutes, 22; Toller, 191. The instructions given to the jury on both points were erroneous. Mrs. Simpson, as the widow of the intestate, her former husband, had no legal right to use the money belonging to the estate for either of the purposes designated.

The judgment must be reversed and a *venire de novo* ordered.

RUFFIN, C. J. The act of 1796 entitles the widow to use as much of the crop, stock and provisions left by her intestate husband, as may be necessary for the support of herself and the family, until the administration granted. But neither that act nor any other authority confers any power on her, more than on any other person, to use money left by the intestate for any purpose whatever. Therefore she must account to the administrator for whatever comes to her hands, like every other person would. If the widow had defrayed the expenses of the funeral, she might have been allowed them, as far as they were proper, in reference to the estate, by way of abatement in the amount recovered. But there was no evidence, that the widow conducted the funeral or paid any part of the expenses of it; and she was bound therefore to pay the plaintiff all the money she took,

and the instructions were erroneous, and the verdict wrong as to the whole sum.

PER CURIAM. Judgment reversed and *venire de novo*.

WILLIAM R. STREET v. JOHN A. MEADOWS.

It is not competent to introduce, as a witness, a member of a firm, to prove that his individual board or any other individual debts were to be paid by the firm.

The cases of *Cotton* v. *Evans*, 1 Dev. & Bat. Eq., 284; *Norment* v. *Johnson*, 10 Ire., 89; *Willis* v. *Hill*, 3 Dev. & Bat., 231; *Cummins* v. *Coffin*, 7 Ired., 196, and *Washing* v. *Wright*, 8 Ired., 1, cited and approved.

Appeal from the Superior Court of Law of CRAVEN County, at the Spring Term, 1850, his Honor, Judge *Bailey*, presiding.

W. H. Haywood, for the plaintiff.
J. H. Bryan and *J. W. Bryan*, for the defendant.

PEARSON, J. This was an action for board furnished to one Clark. To make out his case the plaintiff called said Clark as a witness. The defendant objected, but his testimony was admitted. He swore, that a copartnership was entered into by the defendant and himself to carry on the tin business, in the town of Newbern: that he applied to the plaintiff to furnish him with board and agreed to pay for it in the name of the firm: that board was furnished accordingly and was charged to the firm by the plaintiff.

He swore farther, that his reason for contracting in the name of the firm (and he so stated to the plaintiff) was because it was one of the articles of the copartnership, that his board should be paid for by the firm: that it was not set out in the written articles executed by the defendant and himself, but it was expressly agreed upon, when the copartnership was formed, and he insisted that it should be inserted, but, upon the defendant's saying, "their word was as good as their bond," he consented to execute the articles without having it inserted. Clark was the only witness.

The defendant excepts, because of the reception of his testimony. We think the exception is well founded. It is an abuse of power for one member to attempt to bind the firm for the payment of his private debts, whether it be an antecedent debt, or one about to be contracted, for his board, or clothes, or any other personal expenditure. The mere fact, that he asserts at the time, that he is allowed by the firm to do so, can make no difference, for the act of doing it amounted to such an assertion in every case. *Cotton* v. *Evans*, 1 Dev. & Bat. Eq., 284. *Norment* v. *Johnson*, 10 Ire., 89.

In order to bind the firm, it was necessary for the plaintiff to prove that Clark had the authority of his partners to bind the firm, for his private debt, or that they afterwards acquiesced in it.

No acquiescence is alleged, nor is it alleged that Clark had this authority, unless it was given to him by the original agreement creating the firm. So the only question is, was Clark a competent witness to prove that the original agreement gave him the authority? We hold he was not. From the existence of a firm the law implies that each of the members has certain powers, and, if the firm seeks to put any restriction upon these powers, the fact that such restriction is contained in the articles of copartnership,

will not bind a third person, unless it is also proven, that he had express notice of it.

The question here is precisely the reverse. A third person seeks to add to these powers the authority of a member to bind the firm for his private debts—and this, not by the writen articles of copartnership, nor by the testimony of a third person, but by the oath of the debtor.

If this was admissible, the firm would be entirely at the mercy of each of its members; for, each might pledge the firm for his private debts, and his oath would suffice to fix the liability. Such a position is inconsistent with the very existence of all copartnerships. The bare statement of it shows that it cannot be law. *Willis* v. *Hill*, 2 Dev. & Bat., 231.

It is said the debtor in such cases stands indifferent: for, if the plaintiff fails, the witness remains liable: if he succeed, then, the defendants, after paying the debt, can recover the whole from the witness, unless the authority existed: and the record of the first suit could not be used in his favor. So, it it insisted, he has no interest in the result of the suit. The substance of it is, that a witness may, by his own oath, shift his debt upon the defendants, because the latter in an action for "money paid" can recover the whole back from the witness. This reason is very unsatisfactory, if we suppose such an action could be maintained. For it puts every one in the power of any debtor, who will take a false oath. But in this case the witness and the defendant are partners; and, if, by the oath of the witness, his private debt is fixed upon the firm, the firm cannot maintain an action at law, for "money paid," against him, to recover it back. The only relief of the firm would be in equity, and it is well settled that a court of law can only regard legal rights and liabilities, and must not act upon the supposition that there is another forum, before which more complete justice can be obtained.

The plaintiff's counsel relied upon *Cummins* v. *Coffin*, 7 Ire., 196, and *Washing* v. *Wright*, 8 Ired. 1.

In the former case, it is held, that when the fact to be proven is one that may be established by the *admission* of a partner, his statement upon oath is admissible; for the oath does not weaken the admission. The deposition offered by the plaintiff was treated as a mere *statement* upon oath; for the deposition of the same witness, offered by the defendant, was rejected; whereas, if the plaintiff had been permitted to use the deposition in the strict sense of its being the testimony of a witness called by him, the defendant would surely have been at liberty to continue the examination. But it is expressly put upon the footing of a mere written statement, on oath, of a fact which it was competent to establish by proof of a simple admission. So that case has no bearing.

It is held in *Washing* v. *Wright*, which is based upon *Blackett* v. *Weir*, 11 Eng. C. L. R., 257, that a member of a firm is competent to prove that the defendant is also a partner and liable for the debt. These cases proceed upon the reasoning insisted on by the plaintiff's counsel in this case, and upon which we have already remarked.

We are not willing to extend the principle farther than it has been carried by decided cases. This is an attempt to extend it greatly beyond that limit, and to put it in the power of every member of a firm to shift his private debts upon the firm, by simply swearing that he had authority to do so, and thus add to the powers implied by law. This consequence, so fatal to the existence of all copartnerships, has nothing to support it but the idea, that the defendants may have redress in equity, and we do not adopt it to the extent contended for. *Bland* v. *Ansley*, 5 Bos. & Pull., 331. ——— v. *Webb*, 1 Johns., are in point.

There must be a *venire de novo*.

PER CURIAM. Judgment reversed and *venire de novo*.

THE STATE on the relation of SOLOMON BLYTHE v. JOAB OUTLAND, et al.

Constables are not general collecting agents, except so far as relates to claims within the jurisdiction of a magistrate. Therefore, where an order of the county court was put into a constable's hands for collection; *Held*, that though he received the money, his sureties were not liable.

The cases of the *State* v. *Mangum*, 6 Ired., 369, and *State* v. *Long*, 7 Ired., 379, cited and approved.

Appeal from the Superior Court of Law of NORTHAMPTON County, at the Spring Term, 1850, his Honor, Judge *Manly*, presiding.

B. F. Moore, for the plaintiff.
Bragg, for the defendant.

PEARSON, J. Blythe put into the hands of one Powel, a constable, for collection, the following county order:

"Ordered by the court, that the county trustee pay to Solomon Blythe, sixty-three dollars for rebuilding bridge," &c.

THOMAS HUGHES, CL'K.

Issued 4th July, 1842.

Powel received the money, and, upon demand, refused to pay over. The question is, are the sureties upon his bond liable? We think with his Honor, that they are not.

It is settled by *State* v. *Mangum*, 6 Ired., 369, and *State* v. *Long*, 7 Ired., 379, that the sureties of a sheriff or constable are only liable for such claims as are within the

jurisdiction of a single justice and may be recovered by warrant.

The claim in this case was upon a county order, and of course was not within the jurisdiction of a single justice, and could not have been recovered by warrant; so it falls within the very bounds of the rule above announced.

It was not the intention of the legislature to make constables *general* collecting agents, except so far as relates to claims within the jurisdiction of a magistrate. This was the extent of the evil and to this the statute must be confined.

PER CURIAM. Judgment affirmed.

THE STATE to the use of DUGALD McCOLL, et al. v. THE JUSTICE OF ANSON.

When a criminal case is removed for trial from one county to another, in which the prisoner is convicted, the expense of guarding the jail in the county in which the conviction takes place must be defrayed by the county from which the case was removed.

Appeal from the Superior Court of Law of ANSON County, at the Spring Term, 1850, his Honor, Judge *Settle*, presiding.

Strange, for the plaintiff.
Winston, for the defendant.

NASH, J. The relators join in this proceeding for a

mandamus. A man, by the name of Martin, was indicted in Anson superior court for murder, and the cause was duly removed for trial to Richmond county. There it was tried and the prisoner convicted. After the conviction, a guard was ordered out by the proper authorities, to guard the jail. The property of the prisoner was exhausted, in the payment of his liabilities, and the several individuals, composing the guard, applied for a mandamus, to compel the county of Anson to pay the costs of their services. Several reasons were assigned by the defendant, why the writ should not issue. The first is, that the claims of the relators are several, and not joint, and therefore they could not join in the application—the last, that the county of Anson is not liable. The presiding judge, believing the first objection fatal, discharged the rule, not passing upon any other. The last is the main one, as it affects the rights and liabilities of the parties. Consequently, that, though not decided in the superior court, was principally argued here, and the Court has thought it proper, for the satisfaction of the parties, to express its opinion upon it.

The question arises solely under the acts of our legislature. A slight review of them will serve to bring the point in controversy plainly before us. It is a principle of the common law, that every criminal offence shall be tried in the county in which it is perpetrated. Under our system of administering the law, it is sometimes found that justice demands this principle should be departed from. Accordingly an act was passed in 1801, Rev. St., ch. 31, sec. 120, in which power is given to a judge of a superior court, upon a suggestion on oath, by either party to the suit, that justice cannot be done, to remove the cause for trial to an adjoining county. Under this act the prosecution of Martin was removed to Richmond county for trial. There it was tried and the prisoner convicted.

After the conviction, a guard was, by the proper officer of the county, ordered to guard the jail. This proceeding was had under an act passed in the year 1795, Rev. St., ch. 90, sec. 5. By this section a judge of the superior court, being in the county in which the prisoner is confined, is authorized to direct the commanding officer of the county to furnish to the sheriff or jailor such a guard as may be suitable to the occasion; it further provides that "the guard so ordered out shall receive such compensation, as is or may be provided by law for the militia." Upon the requisition of the superior court, then in the county of Richmond, a guard was called out by the commanding officer of the county—and the enquiry before us, is, which county, that where the prosecution commenced, or that where the trial was had, shall bear the burthen of guarding the jail? By an act passed in 1808, ch. 757, sec. 1, it is provided, that "the several county courts of pleas and quarter sessions shall lay such a tax, &c., as shall be sufficient to pay off the expenses to be incurred for guarding the jail, and removing persons to other counties." Previous to this period, it was a burthen borne by the public treasury. The second section provides, "that hereafter all claims for guarding of prisons and conveying of prisoners, shall be all allowed by the court of the county in which such prison is situated, or from which any person is removed." By the first section of the act of 1810, Rev. Stat., ch. 28, sec. 14, it is enacted, "that in all cases where the counties are liable to pay costs, those counties, wherein the offences shall have been charged to be committed, shall pay them. And all fines, forfeitures, and amercements, shall be accounted for and paid to the trustee of the county, wherein the offence may have been charged to be committed, wherein such fines, forfeitures, and amercements, as may have been charged, shall have arisen." If during the pendency of the prosecution of Martin in Richmond, any fine, forfeiture or amercement,

had been incurred in any way, though collected in that county, they would have gone to the trustee of the county of Anson. As this fund then, and all derived from a similar source in the latter, go to constitute, with the appropriate tax, the fund for defraying these expenses, it would seem to be but right that the county deriving the benefit should bear the burthen. A very ingenious argument was built upon the phraseology of the 7th sec. of the 90th ch. of the Revised Statutes, which is taken from the 2nd section of the act of 1808, above cited. It was, according to that act, to show that if the county of Anson was bound to pay anything, it was only the expense of removing the cause and transferring the prisoner; and that Richmond county ought to bear the expense of guarding her own jail, as it was her duty to provide one that did not need guarding. To this argument the first reply is, it nowhere appears that the guard was rendered necessary, by any defect in the jail. Nor is that the only ground upon which it may be ordered out. But another and a more sufficient one is to be found in the act itself. The provision is evidently made to meet the two cases, where the trial shall be had in the county possessing original jurisdiction, and the other, where it is acquired by removal. Read in this manner, *redendo singula singulis*, and the meaning is apparent. The act of 1810 was passed to remove any doubt, which might rest upon that of 1808, in this matter. We are of opinion that the county of Anson is bound to pay the expenses of the guard, while Martin was confined in the jail of Richmond county.

The point decided by his Honor is not so important, as it relates solely to the mode of proceeding. The decision on it seems to us to have proceeded on a wrong idea as to the nature of the case, as it was before the court. It was treated as a mandamus, at the instance of several relators. It was in truth but a rule, and was so considered

in most respects by the parties. There was no writ, no return; but simply affidavits on both sides. Upon the rule, we suppose the court could mould the writ or writs, so as to suit the case and give to each one of the relators his due. Indeed, we presume the justices of Anson, when informed that their county is liable for the expenses of the guard, would much prefer the decision on that point in this form of one rule, rather than to be put to the expense of a separate mandamus for each of the guard. It is for that reason, the Court has decided the matter of right, so as to facilitate the disposition of the controversy on the case going back.

Judgment reversed, at the costs of the defendant. This opinion will be certified to the superior court of Anson county.

PER CURIAM. Ordered accordingly.

JOHN GREEN v. ROBERT WILLIAMS.

A surety to an appeal by a party, who dies pending the suit, has no lien on his assets until after he has paid what, by the judgment, he was ascertained to be liable for as surety.

The case of *Miller* v. *Spencer*, 2 Murphy, 231, and 2 Car. Law Rep., 231, cited and approved.

Appeal from the Superior Court of Law of DAVIDSON county, at the Spring Term, 1850, his Honor, Judge *Caldwell*, presiding.

No counsel for the plaintiff.

Mendenhall, for the defendant.

PEARSON, J. The plaintiff was the surety of one Harris, for an appeal from the judgment of a magistrate in favor of one Garner, upon a simple contract debt. After the appeal Harris died: and the defendant, his administrator, was made a party, and pleaded "fully administered." Pending this suit the defendant paid to one Sumney a simple contract debt of about $140 against his intestate. On the trial, the plaintiff, Garner, obtained a verdict for his debt, but the plea of "fully administered" was found in favor of the defendant, and Garner signed judgment for his debt, and proceeded by *sci. fa.* to subject the real estate. But failing to get his judgment satisfied, he moved for judgment "*nunc pro tunc*," which was entered against the plaintiff as surety for the appeal of the defendant's intestate; and the plaintiff was compelled to pay the balance due on the judgment. Whereupon he brought this suit; to which the defendant pleaded "no assets," and "fully administered." It was agreed, that, if the payment to Sumney was a legal voucher as against the plaintiff's debt, then the defendant had not fully administered. But if the payment to sumney was not a legal voucher as against the plaintiff's debt, then the defendant had not fully anministered, and judgment was to be in theplaintiff's favor. The court was of opinion with the defendant, and the plaintiff submitted to a nonsuit.

We are not able to see any ground, upon which the plaintiff can object to the preference, which was given by the defendant to Sumney, by a voluntary payment of his debt, although made pending the proceedings by Garner; both were simple contract debts. The plaintiff can take no benefit from the act of 1829: which provides that a surety who pays the debt, shall have the same priority against the assets, as the demand against his principal was entitled to, which in this case was that of a simple contract creditor.

Admit, that after the death of Harris, the defendant, as his administrator, being made a party to the suit, was at liberty to put in the plea of "fully administered," (which point we do not decide). Admit also, that by a proper construction of the act of 1829, a surety paying the debt has a right to take the place of the creditor, and becomes entitled to all of his rights and priorities, (a point which we do not decide,) in this case the creditor, Garner, was bound by the finding of the jury that the defendant had fully administered, and so the plaintiff can take no benefit, if allowed to stand in his place.

It was urged by the plaintiff's counsel that, as he was bound as surety for the appeal, the obligation on his part ought to be ranked as a specialty debt, if not as a debt of record; and so had priority over and excluded all simple contract creditors. The obligation of the plaintiff was contingent and did not bind the assets. This is fully settled. 2 Car. L. R., 413; 2 Williams on Ex'rs, 672; 2 Vernon, 101; *Miller* v. *Spencer*, 2 Murph., 281.

PER CURIAM. Judgment affirmed.

THE STATE to the use of WILLIAM BUTTS v. MICHAEL BROWN.

The sureties on the official bond of the sheriff are not liable for a trespass committed by him under color of his office.

The case of the *State* v. *Long*, 8th Ired., 415, cited and approved.

Appeal from the Superior Court of Law of FORSYTH County, at the Spring Term, 1850, his Honor, Judge *Battle*, presiding.

STATE *v.* BROWN.

This was an action of debt against the defendant, a surety on the official bond of R. W. Long, sheriff of the county of Rowan, for the year 1843. The breaches assigned were, that Richard W. Long, sheriff, in the month of October, 1843, under the 10th sec., 102nd ch., Rev. Stat., had improperly and illegally distrained, seized, and by public sale made out of certain property of the relator, to-wit, segars, the sum of $202.37; and knowing that the said segars were not subject to taxation, appropriated the sum of $202.37 to his own individual purposes.

The relator claimed, first the value of the segars, and secondly, the sum for which they sold.

The witnesses for the plaintiff testified, that the segars were manufactured at Bethania, in the county of Forsyth and the state of North Carolina; were conveyed to the town of Salisbury, in two wagons, for sale: That the sheriff was fully informed, that the said segars were manufactured as aforesaid in this state, but nevertheless claimed a pedlar's tax on each wagon of $100, for failing to show a license, which sums the relator refused to pay: That the sheriff thereupon proceeded to distrain, advertise and sell the said segars, agreeably to the provisions of the said 10th sec., 102nd ch., Rev. Stat., and by his sale raised the aforesaid sum of $202.37: That the said sale was forbidden by the relator: The plaintiff also showed by the certificate of the comptroller, that the said R. W. Long, sheriff as aforesaid, had not paid any portion of the proceeds of said sale into the public treasury: The plaintiff also showed by the record, that he had sued and recovered of said sheriff, R. W. Long, the value of said segars, in a suit at law; and that under a *ca. sa.* issued in pursuance of the said judgment against the said Long, he had taken the oath of insolvency before the bringing of this suit.

All the aforesaid evidence was heard by agreement of parties, subject to the opinion of the court upon the admissibility of the whole or any part thereof. The court intimating an opinion that the plaintiff could not recover, taking the whole testimony to be true, he submitted to a nonsuit, and appealed to the Supreme Court.

Morehead, for the plaintiff.
Mendenhall, for the defendant.

NASH, J. We entirely concur with his Honor who tried the case below. And, while we confirm his judgment, must be permitted to express our own regret, that the obligation into which our ministerial officers enter upon taking office, are so insufficient to the security of the public. The defendant is sued as surety upon the official bond of Richard W. Long, as sheriff of Rowan county; and the only question submitted to us is, do the facts set forth in the case agreed amount to a breach: We are constrained to say that they do not; and although we admit, that a gross and palpable act of violence and oppression has been perpetrated on the relator by the sheriff, we cannot say it is within the bond. The conditions of the sheriff's bond are prescribed by the Act of Assembly, Rev. Stat. ch., 109, sec. 13, and are aa follows: "The condition of the above obligation is such, that, &c.—if therefore, the said ..... shall well and duly execute and make return of all process and precepts to him directed, and pay and satisfy all fees and sums of money, by him received or levied by virtue of any process, into the proper office, into which the same, by the tenor thereof, ought to be paid, or to the person or persons to whom the same shall be due, &c., and in all other things, well, truly, and faithfully execute *the said office* of sheriff, then," &c. It is under the last condition this action is brought. Was Richard W. Long executing the office of sheriff in seizing the segars of the

relator? Very clearly not. He was indeed professing to do what alone a sheriff can do; but what no sheriff has a right to do—committing a simple trespass. The Revenue Act of 1836, Rev. Stat. ch. 102, sec. 10, imposes a tax of $25 on every person, who shall peddle in any county of the state "any goods, wares, or merchandise, not of the growth of this state." The egars in question were manufactured in this state and of this the sheriff was fully informed, and he therefore knew they were not the subject of taxation. This was not executing the office of sheriff; it was violating it in a most flagrant manner, and perverting it to an instrument of wrong and violence. If he had been willing to execute his office truly and faithfully, he would have abstained from taking the property. We have not been able to find any case in which the sureties of a sheriff have been held responsible, for a trespass committed by their principal, and we have looked with much care. The books are full of cases, where sheriffs have under an execution against one man taken the goods of another; but in no instance have the sureties been held responsible. The latter are here sued upon an express contract, and their liability is confined to it and cannot be carried byond its proper and fair meaning. The principles governing this case were fully discussed in the *State* v. *Long*, 8 Ired., 415.

The ocurt then decided that the provision in the sheriff's bond we are now considering, "binds the officer affirmatively to the faithful execution of his office—there is no clause to cover the case of an abuse or usurpation of power—no negative words, that he will commit no wrong by color of his office, nor do anything not authorized by law." This fully and entirely meets this case.

We see no error committed by the judge below in admitting the testimony, and agree with him that the plaintiff upon it cannot maintain his action.

PER CURIAM. Judgment affirmed.

WILLIAM WALTERS v. FLEETWOOD WALTERS.

In an action on a bond, where evidence was given that the bond was to be delivered up, when the obligor paid the costs of a certain suit; *Held*, that this evidence was inadmissible to show that the bond was a conditional one, but that it was proper to show that, by the agreement of the parties, the bond was to be paid in whole or in part by the payment of the costs of the suit, and, therefore, the obligor, if he paid the costs, was entitled to a credit on the bond, *pro tanto*.

Appeal from the Superior Court of Law of ROBESON County, at the Fall Term 1849, his Honor, Judge *Dick*, presiding.

The defendant gave to the plaintiff his bond for fifty dollars, dated March 24th, 1846, and payable on or before July 24th, 1846, and this suit was brought thereon by way of warrant. Pleas, *non est factum*, payment, and accord and satisfaction. On the trial the defendant offered evidence, that, prior to the execution of the bond, a suit was pending between the parties, which they agreed to compromise, and, as a part of the compromise, that the defendant undertook and promised the plaintiff to pay certain costs, incurred in that suit, and that the bond was given as a security for those costs and upon an express agreement, at the time of the execution of the bond, that, upon the payment of the costs by the defendant, the plaintiff should deliver up the bond to the defendant. The plaintiff objected to the evidence, but the court admitted it; and the defendant then gave further evidence, that before this said suit was brought, (which was on the 15th of October, 1847,) the defendant paid the said costs to the clerk of the court, in which the suit had pended. Thereupon the court gave an opinion, that, supposing the evidence to be

true, the plaintiff could not recover; and the plaintiff submitted to a nonsuit and appealed.

Mullins, for the plaintiff.
Dobbin and *Winslow*, for the defendant.

RUFFIN, C. J. As the amount of the costs, which the defendant agreed to pay and did pay, is not stated, and the opinion of the court was given against the plaintiff without any reference to the amount, it must be understood, that the opinion rested exclusively upon the agreement, that the bond should be void or be delivered up, if or when the defendant should pay the costs, whether more or less, and upon the fact, that he had paid them. That is clearly erroneous; for, it is, plainly, nothing less than annexing, upon parol evidence, a condition to a bond, which is absolute upon its face. If the agreement had been, that the plaintiff would accept a deed from the defendant for a tract of land, or any other collateral matter, in satisfaction of the money for which the bond was given, and the thing had been done and accepted accordingly, it is true the defendant would have been discharged, as there would then be an actual subsequent satisfaction, and it would be immaterial when the plaintiff first agreed that he would accept such satisfaction. But in the present case the alleged agreement is, that the plaintiff would accept a less sum of money, whenever paid, in discharge of a bond for a larger sum; which is a thing that cannot be, unless the larger sum be regarded in the light of a penalty, to be saved on the condition of paying the smaller; and it is against fundamental principle to admit parol evidence to establish such a condition, in opposition to the tenor of the bond. If, indeed, the defendant paid the costs in question or any part of

them, we should hold the amount thus paid to be a payment, *pro tanto*, upon the bond sued on; for, if a creditor by bond request the obligor to pay a sum of money to a particular person and agree that such payment shall be allowed as a payment of so much of the obligation, there is no doubt that it may accordingly be treated as a payment or satisfaction to that extent. And it can make no difference whether the request be at or after the execution of the obligation; since, if the former, it is a continuing request, and, until countermanded, authorizes the debtor, in confidence thereof, to make the payment to a third person. Therefore, the defendant was entitled to credit on the bond for what he paid to the clerk under the agreement. But that was all he was entitled to, and he could not ask for a verdict, that he had paid or satisfied the whole sum mentioned in the bond, by having paid a less sum to or for the plaintiff—since that, in law, is not such payment or satisfaction.

PER CURIAM. Judgment reversed and *venire de novo*.

EDWARD H. MEADOWS v. MARY MEADOWS.

In order to constitute an advancement of a slave by parol gift, there must be an actual delivery and change of possession.

While a son continues to reside with his father the gift has no operation, but when he removes and takes the slave with him, the advancement becomes effectual and its value must be estimated at that period.

A child does not lose the benefit of an advancement of a slave by selling it.

Advancements are understood to be gifts of money or personal property for the preferment and settling of a child in life, and not such as are mere presents of small value or such as are required for the maintenance or education of the child.

The cases of *Stallings* v. *Stallings*, 1 Dev. Eq., 298; *Hinton* v. *Hinton*, 1 Dev. & Bat. Eq., 587; *Adams* v. *Hayes*, 2 Ired., 361, and *Cowan* v. *Tucker*, 5 Ired., 78, and 8 Ire., 426, cited and approved.

Appeal from the Superior Court of Law of CRAVEN County, at the Spring Term, 1850, his Honor, Judge *Bailey*, presiding.

Edward Meadows died intestate in 1846, and the present suit was instituted by petition by some of his children against the administratrix and widow and other children for distribution of his estate. A question was made at the hearing, whether one of the children, John A. Meadows, was fully advanced, or not; and as to that the parties argued on the following facts: Edward Meadows was a mechanic, and worked at his trade. When this son John A. was about ten years old, the father purchased a negro boy, and declared he intended him for his said son, and from that time forth the negro was called the son's in the family. The son was then living with his father, and when he became large enough, he worked with his father at his trade. After he became eighteen years old, the father allowed the son to take the earnings of the

negro until he married; and when he married, he removed to himself, and carried the negro with him and kept him in his possession, using him as his own, until, in July, 1841, for some fault, he sold the boy for $700; and the father assented to the sale. On the part of the son, it was insisted, that the gift was made as soon as the father purchased the slave, and that the negro should be valued as of that period, or, at the latest, when he had the boy's earnings: while the other children insist, that the son was chargeable with the price, $700, and also with the various sums made and received by him, as earnings of the boy, after the son was eighteen. The court held the son to be chargable with the price he got for the negro, that is, the $700; and each side appealed.

J. H. Bryan and *J. W. Bryan*, for the plaintiffs.
No counsel for the defendants.

RUFFIN, C. J. The opinion of the Court is clear, that there was no such possession of the son, while he continued to live with his father, as could constitute a good gift of the slave, as an advancement under the statute. An actual delivery and visible change of possession are indispensable to constitute a valid parol gift. This point was so fully investigated in *Adams* v. *Hayes*, 2 Ire., 361, that it is only requisite to refer to that case as settling it. The Court holds, however, that the gift of the negro became complete, for the purposes of the question before us, when the son left the father and actually took the negro with him. That was a visible change of possession upon an actual, though imperfect, gift by the father: and the negro would, unquestionably, have been an advancement, as of that period, under the proviso in the act of 1806, had the son not sold the negro, but retained him in his own posses-

sion, until the death of the father intestate. *Stallings* v. *Stallings*, 1 Dev. Eq., 298; *Hinton* v. *Hinton*, 1 Dev. & Bat. Eq., 587. It seems to the Court, that to this purpose the possession of the son's aliense is that of the son himself. The substance of the proviso is, that when a gift of a slave is made by a parent, either expressly or by implication, and the parent actually parts from the possession to the child and never again takes it, but dies without otherwise disposing of the property by any act *inter vivos*, or by making a will, the gift thereby becomes comple *ab initio*, so as to amount to an advancement from that period. That is the effect of what was said upon the construction of the act in the cases just cited and in that of *Cowan* v. *Tucker*, 5 Ire., 78, and 8 Ire., 426; in which the judges use the expresssion, that the parent died "without having resumed the possession," and the like, as equivalent to that in the statute of the slave's "remaining in the possession" of the child. Several cases may readily be put, which show that such must be the sense of the act. Suppose, for example, that a parent gives six slaves to a child by parol; if they all live and remain with the child until the parent die intestate, the case is within the words of the act, and the slaves constitute an advancement from the time of the gift, and the issue of the slaves are deemed to have been the child's. But, if one of the six die before the parent, could it be doubted, that the child would, nevertheless, have to account for that one as a part of his advancement? Plainly, he ought: for the gift was of the whole at once, as one advancement, and the child could not keep the other five and their increase, at the original value of the five, and throw the loss of the death of one on the parent. Nay, suppose such a gift of a young female slave, who afterwards has a numerous progeny and dies before the donor: the accident of such death cannot alter the right to the issue, nor change the period to which the advancement is to be re-

ferred. For, if she had lived longer than the donor, she would have been, alone, the advancement, and no notice would be taken of the children, which would be regarded as belonging to the child as they came *in esse*, as incident to the child's title to the mother. Surely the legislature could not mean, that the death of the woman should make her cease to be an advancement, and, further, convert the issue into several substantive advancements. At what periods would they be advancements? They were never "put by the parent into the possession of the child;" and the child would not have a title to them at all, or would derive it through that to the mother, and, consequently, the mother was the subject of the advancement, though dead at the period when the child's title first became irrevocable and complete. Again, if the child die before the parent and the slaves be taken by the child's administrator or executor, and applied in a course of administration, or held as a part of the estate until the parent's death, it seems plain that the slave would still be an advancement to the child as of the time of the original gift; for, the case would not be within the mischiefs against which the act is directed, and if the gift were not effectual, the unquestionable purpose of the parent, and expectation of the son and his creditors and family would not be defeated. So, if there be grand-father, father, and son, and the grand-father make a parol gift to the father of slaves, and the father makes a like gift to his son of the same slaves, and then dies intestate. Now, in such a case, it may be admitted, that the grand-father could annul his gift and take back the negroes: yet, if he did not, it could not have been the intention of the legislature, that his gift should be annulled, as a matter of law simply, since it is plain, that, as between the father and his son, the portion given to the son was an advancement, and the very purpose of the grand-father in making his gift originally was to enable his son to provide for his

family. The possession of the grand-son in such a case must be deemed that of his father, being under him, within the meaning of the legislature. Again, if the fact of the possession not remaining with the child at the death of the parent, by reason of the prior death of the slave, were to defeat the operation of the proviso, it would produce manifest and gross injustice in many cases; as, for example, by making the child account for hires or profits while he had the possession, though the parties contemplated no such thing. The case of a sale by the child, not invalidated by an objection of the parent, stands upon the same reason with the cases just put. The possession of the vendee is the same as that of his vendor, and, instead of impeaching, completes the advancement. This sale is called that of the son, since the case is understood so to mean. It might be very different if the son did not profess to own the slave and not to sell him as his, but only under the authority of the father, and to ask for the assent of the father as necessary to the validity of the sale. Then, indeed, it would be substantially the sale of the father, and his gift that of the money, and not of the slave. But here the sale is stated to be that of the son, and, of course, as upon his own title; and the assent of his father is to be understood as rather evidence of his approbation of the son's sale, and not importing that he, the father, made it or joined in it. The Court therefore holds, that, in this case, the advancement is to be estimated, as of the day the negro was exclusively in his son's possession: that is, when he left his father's and took the negro with him; which may be more or less than the price of $700, subsequently received for him—for the case agreed does not state the length of time between those events, nor the value at the former one. Of course the son is not liable for hires or profits after he had such exclusive possession, as the negro is then taken to be his. Whether the sums given him by his father,

while living with him, are advancements or not, the case does not furnish facts to enable the Court to say. For, it does not appear, what was the amount of those sums, nor for what purpose they were given. It may be possible they were advancements; though it is not very probable, we conjecture. Small sums of money given by a father to a son in his minority, who is living with him, to supply him with clothing or to defray the expenses of the ordinary pleasures and amusements of youth in their rank of life, are not deemed advancements; and the rule would not be varied by the circumstance, that the father derived the money from any particular source. We suppose it most probable that such was the nature of this case; and, if so, the opinion of the Court would be that sums given for such purposes, though spoken of as the profits of the negro, would not be advancements; for, advancements are understood to be gifts of money or personal property for the preferment and settling of a child in life, and not such as are mere presents of small value or such as are required for the maintenance or education of the child, which the law throws on a father, at all events. Not knowing the facts, however, with precision, the Court cannot determine that point definitely. The decree must therefore be reversed—each party paying their costs in this Court; and the cause must be remanded and this opinion certified to the superior court, in order that the decree may be there varied accordingly, and farther proceedings taken in the case.

PER CURIAM. Ordered accordingly.

THE STATE on the relation of ISRAEL FANSHAW v. WILLIAM JONES, et al.

An infant mulatto child was found at the door of a gentleman, who took charge of it, and it remained in his possession for more than seven years, he professing that he did not claim her as a slave, but believed she was free, and refused to deliver her to any person, who could not show a good title to her as a slave. At his death, he left her two hundred dollars; *Held*, *first*, that, if she was free, of course the next of kin could not claim distribution of her or of the legacy; *secondly*, if she was a slave, the next of kin were entitled to distribution of the legacy, and also of the girl herself, if he had her three years or more in adverse possesssion; and that, to vest the title of the slave in him, by virtue of the statute, it was not necessary that he should have claimed her as a slave.

Appeal from the Superior Court of Law of CURRITUCK County, at the Spring Term, 1849, his Honor, Judge *Manly*, presiding.

This is an action of debt on the bond, given by Jones, as the administrator of the will annexed by Henry Britt, deceased. Pleas, conditions performed, and no breach. The relator is the administrator of the testator's widow, who dissented from her husband's will. The breach assigned is, in not distributing a negro slave named Mary Ann and the sum of $200, left by the testator and not effectually disposed of in his will. It was admitted at the trial, that, if entitled at all, the relator was entitled to one-third of the negro and money, and that, before suit brought, he demanded the same of the defendant Jones, who denied the relator's right to any part of the fund. In the will there is the following clause: "The girl Mary Ann, which was picked up or found at my door, is to remain with my wife Polly, until she arrives at the age of twenty-one; and then it is my will, that she be and enjoy

all the benefits of a free person of color. I also give and bequeath to the said Polly the sum of two hundred dollars."

For the purpose of showing that the girl Mary Ann was the slave of the testator, the relator gave evidence to the following effect: The testator resided in Currituck county, and, about the year 1829, one Wilson, who resided in the same county, sold to one Willis a female slave, named Milly, who was pregnant. Willis resided in Caswell county and was a negro-trader. The woman ran away from Willis in Currituck, and in some short time afterwards she came to the house of a widow lady, who lived in Currituck, and a short distance from Britt's, bringing with her a female infant, perfectly naked and apparently not more than a day old. The lady told the woman, that she and her child would die if they continued in that condition, exposed in the woods, and advised her to go to her owner. The woman went away, and, in two or three days afterwards, a mulatto female infant was found at the door of Britt's house, who is the girl Mary Ann. But the lady did not see the infant in any short time, and therefore did not know her to be the same, which the woman Milly brought to her house; but evidence was given that the girl Mary Ann is a bright mulatto and bears a family resemblance to the said Milly. Britt and his wife had no children, and took the found child into the house with them, brought her up tenderly, and became much attached to her. About four years afterwards, Willis returned to Currituck and claimed Mary Ann, as the child of his woman Milly and his slave, and demanded her from Britt. But the latter refused to give her up, saying that neither Willis nor any other person should have her without establishing a title to her by law; for that he, Britt, did not claim her as a slave, and

believed that she was not, but that she was the offspring of a white woman and a colored man. Britt frequently made similar declarations until he made his will and died, which was in 1836. Since that time the girl Mary Ann has lived with the defendant, Jones, but he did not claim her as a part of Britt's estate, nor as the property of any person.

Upon the foregoing evidence the court instructed the jury, that their first enquiry should be, whether the girl Mary Ann was born a slave or not, which depended upon the fact, whether she was the child of a free woman or of a slave. If they should find that her mother was free, then their verdict should be for the defendants. But, if they should be of opinion, that she was the child of the woman Milly or of any other slave mother, so as thereby to be, herself, a slave, the next enquiry was, whether she was the slave of the testator Britt. And upon that point the court proceeded to say, that the possession of Britt, as stated, was insufficient to vest the property in him, unless during the time he claimed a property in her; for, to have that effect, his possession must not only have been maintained for three years against all other persons, but must also have been maintained with a view to his own benefit; and, therefore, if the jury should be of opinion, that Britt did not claim Mary Ann as his slave, then also the verdict should be for the defendants. From a verdict and judgment against him the relator appealed.

Heath, for the plaintiff.
Jordan, for the defendants.

RUFFIN, C. J. The directions were certainly right, if the jury believed the foundling to be the child of a free mother. But on the supposition that her mother was a slave, the directions were clearly wrong, at least, as to the money claimed by the relator; for, whether the donee

of the money was a slave of the testator, or of Willis, or of another person, she was equally incapable of taking under a bequest, and the $200, therefore, resulted to those entitled to the surplus of the estate. The Court, however, holds, that the whole of that part of the instruction was erroneous, if in fact the child was a slave. For, the possession of Britt, and of the defendant, since Britt's death, was, undoubtedly, adverse to Willis, to whom the testator refused to deliver the child upon demand. Indeed, the instruction supposes the possession of Britt to "have been maintained against all other persons;" in other words, to have been adverse to all the world, who claimed the girl as a slave; and, yet, it was laid down further, that such a possession did not vest the title of the slave in the possession, if he believed her to be free and did not keep the possession with a view to his own benefit. The Court cannot adopt that opinion. For, the possession for more than three years bars the action of the owner under the act of 1715: and then the act of 1820, Rev. Stat., ch. 65, sec, 18, is, that the person, so in possession, and those claiming under him, shall be deemed to have a good and absolute title to the slave, as against all persons so barred by the statute of limitations. When the owner is thus barred and loses his action and title, the negro must necessarily belong to the possessor; the *status* of the slave is not changed, but continues, and as a slave must belong to some one, and as no one can recover from the possessor, such slave must be deemed in law the absolute property of the possessor. So the rule was laid down in the case of *White* v. *White*, 1 Dev. and Bat., 260, and it governs the present case.

PER CURIAM. Judgment reversed and *venire de novo*.

JOHN L. FAIRLY v. MARGARET McLEAN.

The interest in a bond payable to A., or to A. or order, can only be transferred at law by indorsement.

Appeal from the Superior Court of Law of RICHMOND County, at the Spring Term, 1850, his Honor, Judge *Settle*, presiding.

Banks, for the plaintiff.
Winston, for the defendant.

PEARSON, J. This is trover for three single bonds. The plaintiff's intestate owned the bonds. One was payable to him or *bearer;* the others were payable to him. The intestate delivered the bonds to his son, John McLean, saying, "I give these to you and your children forever." The son died soon after his father, having the bonds in his possession, and the defendant, who is his widow, took them into her possession and converted them.

His Honor charged that the gift was perfected by the delivery: The right thereby vested in the son, and the plaintiff could not recover. To this part of the charge the plaintiff excepts. We think the exception well founded, as to the bonds payable to the plaintiff's intestate. The plaintiff yields the question, as to the bond payable to his intestate or bearer.

By the act of 1786, the bonds payable to the plaintiff's intestate are considered as if payable to him *or order:* and it is provided that all such bonds shall be negotiable; and all interest and *property* therein shall be transferable by endorsement in the same manner as promissory notes; and, by the act of 1762, promissory notes are made

assignable in the same manner as inland bills of exchange are by the custom of merchants in England; and inland bills of exchange payable to *order*, are, by the law-merchant, assignable by endorsement and delivery. Baily on Bills, 98.

The result is, that the two bonds in controversy were negotiable by endorsement and delivery. In that way, and in that way only, can the right of property be transferred. Both acts must concur. An endorsement without a delivery will not effect the transfer. *Nelson* v. *Nelson*, 6 Ired. Eq., 409. And for the same reasons the transfer is not perfected by delivery without endorsement.

At common law, a note or bond was not considered property. It was not the subject of larceny. It could not be seized upon a *fieri facias*—nor could it be transferred in any way. It was a mere "chose in action," an ideal thing—giving certain right to the owner—and although courts of equity, from an early period, have given protection to persons, who, for valuable consideration, purchased this ideal thing, or right to have money, courts of law have never recognized a third person as being the owner, unless the interest and property therein have been transferred in the manner prescribed by the statute.

It is said, that by allowing the action of trover to be brought for the conversion of notes and bonds, the courts recognize them as property. That is true to a certain extent: but, although recognized as property, *non constat*, that bonds and notes may be transferred in any other than the mode prescribed by law. Slaves are property; but slaves can only be transferred by gift in the manner prescribed by law.

There must be a *venire de novo*.

PER CURIAM. Judgment reversed and *venire de novo*.

THE STATE on the relation of P. W. SPENCER v. R. M. G. MOORE, et al.

It seems that the presumption of the death of an individual, arising from his absence from his domicil for seven years, does not imply that he died a the end of the seven years, but that he died either then or at some other period during the seven years.

The next of kin cannot support an action on an administration bond for their distributive shares, because this implies that the estate has not been administered, and the action should be by an administrator *de bonis non.*

The case of the *State* v. *Johnson*, 8 Ired., 381, 397, cited and approved.

Appeal from the Superior Court of Law of HYDE County, at the Spring Term, 1850, his Honor, Judge *Bailey*, presiding.

Samuel Spencer died intestate in Hyde county, in May, 1846, and in November following administration of his estate was granted to Thomas B. Gibbs, who entered into the usual bond, for $2,500, with the defendants as his sureties. The intestate left no issue, and Gibbs married his aunt and claimed to be entitled in her right, as sole next of kin, to the personal estate. He sold the effects and got in the money, to the amount of $829.09, which he applied to his own use, and then he died insolvent, in April, 1848. John Spencer, a brother of the intestate Samuel, formerly resided also in Hyde county, and left it on the 1st of May, 1841, saying, he was going to some distant western state, and he has not since been heard of; and in May, 1848, administration of the estate of the said John was granted to the relator, as upon a death and intestacy; and in August, 1848, this action was brought on the administration bond, alleging the breach to be in failing to pay the said sum to the relator, as the administrator

of said John, the surviving brother and sole next of kin of the intestate Samuel. The pleas were conditions performed and no breach.

Upon these facts the court was of opinion, that the plaintiff could not maintain the action, and ordered a nonsuit; and the relator appealed.

Shaw, for the plaintiff.

W. H. Haywood and *Donnell*, for the defendants.

RUFFIN, C. J. To constitute the relator's intestate Samuel's next of kin, it is necessary that John should have survived his brother: as to which point, the only evidence is, that, at the time of Samuel's death, seven years had not elapsed from John's departure from this state, though that period has now elapsed, and had, when administration was granted to the relator. It is thence inferred, that John Spencer is now dead; but that he was not dead at his brother's death in 1846. The rule, as to the presumption of death, is, that it arises from the absence of the person from his domicil without being heard of for seven years. But it seems rather to be the current of the authorities, that the presumption is only, that the person is then dead, namely, at the end of seven years; but that the presumption does not extend to the death having occurred at the end or any other particular time within that period, and leaves it to be judged of, as a question of fact, according to the circumstances, which may tend to satisfy the mind, that it was at an earlier or later day. *Doe* v. *Napeau*, 5 Barn. & Ad., 86. 1 Greenleaf Ev., sec. 41. The authorities, however, are not uniform upon the point. *Smith* v. *Knowlton*, 11 New Hamp. Rep., 191. However the rule may be on that subject, it is not necessary that the court should take the trouble of investigating, because, at all events, the relator, as the repre-

sentative of the next of kin, cannot have an action on the administration bond. By the very act of bringing the suit the relator affirms, that the first administrator had not administered the estate. Therefore, the right to call him to account and to put the bond in suit is vested in the administrator *de bonis non*, as the Court has already held during this term, in *The State, on the relation of Williams* v. *Britton's adm'r*, upon the authority of the previous case of *The State* v. *Johnston*, 8 Ire., 381, 397.

PER CURIAM. Judgment affirmed.

JOHN LAMBERT v. JOAB LAMBERT.

Where a party offered in evidence the copy of a deed, for the purpose of showing the receipt of money, and it appeared that the deed had not been proved nor acknowledged by the supposed bargainor, but notice had been given to produce the original; *Held*, that the copy was not admissible for any purpose, as the original would not be, until properly proved.

Appeal from the Superior Court of Law of RANDOLPH County, at the Spring Term, 1850, his Honor, Judge *Battle*, presiding.

This was an action of assumpsit for money paid by the plaintiff, as defendant's surety.

On the part of the plaintiff it was proved, that the defendant was indebted to Abel Cox and several other persons, and being about to leave the state, and not being able at the time to pay the debts, an arrangement was made between him and his son, John R. Lambert, and the plaintiff, that the said John R. and the plaintiff should

assume his debts, or should become security for them, upon his conveying to them a certain tract of land and certain articles of personal property to be applied to the payment of them. The defendant therefore executed to the plaintiff and John R. Lambert, absolute deeds for two tracts of land, and made a verbal assignment of the personal property, and they took up and cancelled the notes held by the defendant's creditors, and gave their own notes for the debts, which the plaintiff subsequently paid, the other surety, John R. Lambert, having become insolvent.

The defendant insisted, that the agreement between him and the plaintiff and John R. Lambert, was, that the two latter were to pay the debts of the defendant upon his conveying to them his land and other property; and consequently, the notes which they gave to the defendant's creditors, were given as their own in discharge of the defendant's liability—and that when they were paid by the plaintiff, it was a payment of his own debts and not as surety for the defendant. He gave in evidence a letter. The defendant contended further, that if this were not the true agreement between the parties, but his property was conveyed to the plaintiff and John R. Lambert as collateral security only, that then the plaintiff and John R. Lambert had sold this land and the plaintiff had received more than enough to pay the amount of the debt, which he now seeks to recover. And to prove this, he offered in evidence a copy of a deed for the land, alleged to have been executed by the plaintiff and John R. Lambert to John Lambert, Sen., the father of both the plaintiff and defendant. This was objected to, because the original was not produced, and because, though it had been aeknowledged by John R. Lambert and registered, it had never been proved or acknowledged as the deed of the plaintiff, and consequently had not been registered as to him. The defendant then showed a notice to the plaintiff to produce the original: that John Lambert, Sen.,

was dead: and that the plaintiff and another were his executors: and that at the time of his death, the testator had property amply sufficient to pay $400, the consideration recited in the deed. He then stated that the deed was offered only for the purpose of showing an acknowledgment by the plaintiff, that he had received the amount or at least half of the amount of the consideration money recited in the deed, and for this purpose and this alone it was received by the court. It was then proved, that John R. Lambert had received $50 only of the purchase money, and it appeared that the proceeds of the personal property had been applied to the payment of debts not claimed in this action.

The court instructed the jury, that if they inferred from the letter offered in evidence by the defendant, that the agreement between the parties was as the defendant first contended, then the plaintiff could not recover; but, if they found that the land and other property were conveyed to the plaintiff and John R. Lambert as collateral security, then the plaintiff was entitled to recover unless they were satisfied by the evidence, that he had actually received from the proceeds of the land sufficient to pay the amount now claimed by him.

The jury returned a verdict for the defendant; and the plaintiff moved for a new trial, because the presiding judge had left the construction of the letter to the jury, instead of deciding upon its meaning himself; and because of the admission of improper testimony, in suffering the defendant to read the deed from the plaintiff and John R. Lambert to John Lambert, Sen., for any purpose. The court thought there was nothing in either of these objections, of which the plaintiff had a right to complain, and therefore refused the motion for a new trial and gave a judgment for the defendant, from which the plaintiff appealed.

Mendenhall, for the plaintiff.
W. H. Haywood, for the defendant.

NASH, J. The plaintiff asks for a *venire de novo* on two grounds. The first, for error in the judge in submitting to the jury the construction of the letter, which was given in evidence by the defendant. The second, for error in suffering the defendant to read to the jury the copy of the deed from John and John R. Lambert to John Lambert, Sen., for any purpose. In the argument here, the first ground has been properly abandoned. The instrument is so worded, that the judge committed no error in law in submitting the construction to the jury. In admitting the paper purporting to be the copy of a deed of conveyance from the plaintiff and John R. Lambert, there was error.

The deed had been proved and registered as to John R. Lambert, but not as to the plaintiff. His Honor rejected it as evidence of a conveyance of the title of the land, but upon notice to the plaintiff to produce the original, admitted it as evidence of a receipt of the money or a portion of it, for which it was said the land sold. But as far as the case discloses the fact, there was no evidence whatever, that the plaintiff had executed the paper, of which the one offered in evidence was alleged to be a copy. The supposed original therefore would not have been evidence against him. Upon what rule of evidence could the copy be? The sole question presented to us at this time, being the competence of this evidence, our view of the case is confined to it. And being of opinion that it was erroneously admitted, the judgment must be reversed and a *venire de novo* ordered.

PER CURIAM. Judgment reversed and *venire de novo*.

DICKSON, MALLORY & CO. v. PLEASANTS JORDAN, et al.

No warranty of quality is *implied* in the sale of goods.

If a vendor sells articles, apparently of the kind ordered by the vendee, though the vendee has no opportunity of testing the quality, until after he has used them, yet, if there be no fraud on the part of the vendor, the purchaser must bear the loss, if it turns out that there is a defect in the articles.

Appeal from the Superior Court of Law of HERTFORD County, at the Spring Term, 1850, his Honor, Judge *Ellis*, presiding.

Smith, for the plaintiffs.
Bragg, for the defendants.

PEARSON, J. This was assumpsit. The declaration contained two counts; one on a special contract, the other for goods sold and delivered.

The defendants, who were the owners of a fishery, applied to the plaintiffs, who were merchants, at their store in Norfolk, for ten rolls of "seine rope," and informed them that it was to be used at their fishery. The plaintiffs did not have the article on hand, but engaged to procure it and send it to the defendants, at the price of 13¾ cts. per pound, and which was accordingly done.

The rope sent was new and of the size and kind known as "seine rope." The defendants used it, but it proved to be of inferior quality, and repeatedly brcke in drawing the seine, and was unfit for fishing purposes. The court instructed the jury, that if the plaintiffs knew the pur-

pose for which the rope was intended, and it was not present at the time of the sale, so that the defendants had no opportunity to judge of its quality, the law implied a warranty, that it should be reasonably fit for the purpose of fishing:

That, if the defendants, when the rope was sent, could by examination, have detected its bad quality and unfitness, their reception of it was a waive of the warranty. But if its bad quality and unfitness could not be detected except by actual trial, and using it in the fishing operations, the reception of it was not a waive of the warranty; and if the jury were satisfied that it was in fact of bad quality and unfit for fishing purposes, they ought to make a reasonable deduction from the price. The jury made a deduction, and the plaintiffs except, for error in the charge.

It is a principle of the common law, that no warranty of quality is implied in the sale of goods. "*Caveat emptor.*" In the absence of fraud, if the article proves to be of bad quality, the purchaser has no redress, unless he has taken the precaution to require a warranty. This rule is founded in wisdom; and its practical good sense is so well fitted to the habits of our trading people, that we are disposed to adhere to it. We believe it is adopted in almost all of the states of the Union, where the common law prevails.

The law protects against fraud, and the vendor is held liable, if he *knows* of the defect. If he is innocent, the purchaser must protect himself by a warranty. And it is supposed, that, in general, trade is sufficiently protected, in the absence of fraud, by the inducement which is held out to all dealers, to take proper care in the selection of their merchandise, arising from the fact, that by selling articles of good quality, they secure customers, and by selling those of bad quality, their customers desert them. Merchants buy upon their own judgment; they sell upon

the judgment of their customers, and only undertake for good faith and fair dealing. If a warranty was implied of the good quality of every article sold, there would be but few merchants, or prices would be exorbitantly high.

His Honor was of opinion, that, in this case, there were two facts, which furnished a sufficient ground for making an exception to the general rule. The plaintiffs knew the purpose for which the rope was intended, and it was not present to be judged of by the defendants. One or both of these facts might have been a very sufficient reason for requiring a warranty, and then it is to be presumed an advance in the price would have been insisted on. But we do not see how they can furnish a ground for the law to imply a warranty in favor of the defendants, when they neglected to take one for themselves.

The purpose, for which an article is intended, is known in almost every case, and the accident that it happens to be expressed, unless it *enters into and forms a part of the bargain*, can make no difference. One buys a set of harness, for instance. Can it make any difference, if he happens to say that his purpose is to use them for his carriage? The purpose is known, whether he says so or not, and the *price* is the same. Where, then, is the consideration to support this implied warranty; what does he *pay for it?* The case would be different, if he should tell the merchant, that his carriage was particularly heavy, or his horses unruly, and he was willing to pay a higher price to have the article warranted to be strong and fit for his purpose. So, if two men buy seine rope; one says nothing about his purpose; the other most unnecessarily says, he intends it for his fishery; both pay the same price, and the rope turns out to be of bad quality; upon what principle can the one insist on a reduction, while the other is obliged to pay the price agreed on?

But the rope was not present and the defendants had no opportunity, at the time they engaged it, to judge of

its quality. If the bad quality could not have been detected by an examination, and it was necessary to put it in use, before its unfitness could be discovered, what did the defendants lose by not having a chance to inspect it? They saw it when it was sent, which answered the same purpose, as if they had seen it when it was bought. One inspects for himself; another sends an order—both pay the same price—the rope upon trial is found to be unfit—can there be any difference, and from what can the law imply a warranty in the one case and not in the other?

His Honor was of opinion, that if the bad quality could have been detected by examination, the defendants, by receiving it, impliedly waived the implied warranty. We do not clearly apprehend the meaning of this part of the charge, unless it be, that if the defect was obvious, the defendants could not, in such case, complain of being cheated, for their means of information were the same as that of the plaintiffs', and a man cannot be cheated, who acts with his eyes open and knows of the defect, before the contract is executed. In this we concur.

The only difference it can make, when the purchaser sees the article and when he sends an order, or has not an opportunity to see it, is, that in the former case he judges for himself; in the latter he constitutes the vendor his agent to select for him, and from the confidence reposed has a right to expect that the vendor will give him the aid of his judgment. But this does not furnish ground to imply a warranty; there is no consideration for that. It only gives him a right to a fair exercise of the vendor's judgment in place of his own, and he has no cause of complaint, unless there be fraud, from which the law equally protects in both cases.

The decisions, in which an exception is made, when the vendor is the manufacturer of the article, have no appli-

cation to the present case, and we do not enter upon the enquiry, how far the exception is well founded.

There was error in the charge. There must be a *venire de novo.*

PER CURIAM. Judgment reversed and *venire de novo.*

TILMAN FARROW v. ISAIAH RESPESS.

On the guaranty of a note, the guarantee is not bound to show that he has made a demand on the maker, but the guarantor is only discharged, when it appears that he has suffered loss in consequence of the guarantee's not using due diligence.

The cases of *Shewell* v. *Knox*, 1 Dev., 404, and *Ashford* v. *Robinson*, 8 Ired., 114, cited and approved.

Appeal from the Superior Court of Law of BEAUFORT County at the Special Term in January, 1850, his Honor, Judge *Battle*, presiding.

This was an action of assumpsit upon the guaranty of a note, a copy of which, marked A., is sent as a part of this case.

For the plaintiff it was proved, that the note was given by the guarantor, in payment for the purchase of a share in a vessel.

At the time when the note became due, on the 1st day of October, 1846, the maker had a store in the town of Bath and had $2 or 3,000 worth of property in possession, and was then supposed to be solvent; but on the 6th day of January following, he executed a deed in trust, and

the effects therein conveyed did not pay his debts by $5 or 6000. In February or March afterwards he died totally insolvent, and no administration has been taken on his estate. It was proved, that up to the time when he executed this deed of trust, he was punctual in paying demands upon him, borrowing money to meet such demands rather than be sued or warranted upon them; and that, as late as the latter part of December, 1846, he borrowed $400 from the bank by the aid of his father, who was a man of property. No evidence was offered of any demand having been made of Topping, the maker of the note, nor was it shown that any was made upon the defendant as guarantor, until a few days before the bringing of the action. This demand was made by Havens, to whose use this suit is brought, who has always resided in Washington, twenty miles from Bath.

The plaintiff's counsel contended that, by the special terms of the guaranty, the defendant was bound absolutely and in all events to pay the note; but that, if that were not so, he was bound, unless it appeared that the money might have been collected from the maker, by the use of reasonable diligence. The defendant's counsel contended, that the plaintiff could not recover, for the want of a demand on the maker of the note; and also of a failure to use due diligence in endeavoring to collect the money from the maker: and that the question of diligence was a question of law, to be decided by the court.

The court held, and so instructed the jury, that the defendant was not bound absolutely and in all events, as if he was a surety to the note; nor was he discharged by the plaintiff's failing to show a demand upon the guarantor under the circumstances of this case: that the true enquiry was, whether the defendant had sustained any damage by the plaintiff's failing to use due diligence in endeavoring to collect the note from the maker, that is, such diligence as a man of ordinary prudence would use in collecting his

own claim: that if they believed that the plaintiff could not have collected the money from the maker, by the use of such diligence, then they ought to find a verdict for him; otherwise, for the defendant. The plaintiff had a verdict and judgment, and the defendant appealed.

(A.)

$307.70. WASHINGTON, N. C., April 1st, 1846.

Six months after date I promise to pay W. H. Willard or bearer, three hundred and seven dollars and seventy cents, for value received, as witness my hand and seal.

L. J. TOPPING, [SEAL.]

Upon the back of which note this endorsement appears: "I hereby guarantee the payment of the within note to Tilman Farrow."

ISAIAH RESPESS.

April 26th, 1846.

No counsel *on either side.*

NASH, J. On the part of the defendant it is objected, that the plaintiff cannot maintain the action, for the want of a demand on the maker of the note, the subject of the guaranty; and also because of a failure on the part of the plaintiff to use due diligence in endeavoring to collect the money from the maker of the note; and because the question of diligence was one of law, to be decided by the court.

To these objections the charge of the presiding judge was a full answer. The jury were instructed, that the defendant was not discharged, under the circumstances of this case, by the plaintiff's failing to show a demand; that the true enquiry was, has the defendant sustained any damage, by the failure of the plaintiff to use due diligence in endeavoring to collect the note from the maker —that is, such diligence as a man of ordinary prudence

would use in collecting his own claim. That he might not be misunderstood, his Honor proceeds: if they believed the plaintiff could not have collected the money, by the use of such diligence, then they ought to find a verdict for him; otherwise, for the defendant. To enable the jury to come to a satisfactory conclusion on the question, he informs them what in law is due diligence. Their attention was then drawn, very distinctly, to the true point in issue between the parties, to wit, the injury sustained by the defendant, in consequence of any misconduct of the plaintiff, in endeavoring to collect the money. There can be no doubt, but that the endorsement of the note by the defendant is an express guaranty. It is so in its terms, and was not made simultaneously with the note, but nearly three months thereafter. "I hereby guarantee the payment of the within note to Tilman Farrow." There is no room for constructions; it is a positive undertaking, and the defendant assumed all the responsibilities of a guarantor and no more. After ascertaining the true character of the contract, on the part of the defendant, the only enquiry is as to the fact of damage to him, resulting from the *laches* of the plaintiff. If the plaintiff has, by any misconduct of his, put it out of the power of the defendant to secure himself in part or in whole, to the same extent is his claim upon the guarantor diminished. If the loss has been a total one, his claim is gone; if a partial one, he is entitled to redress *pro tanto;* because the obligation of a grantor is, that if the money, by due diligence, cannot be collected out of the maker of the note, he will pay it. Ordinarily it is the duty of the holder of a guaranty to demand the money of the maker of the note; but if the maker be insolvent, it is not necessary. In this a guaranty differs from an endorsement. In the latter case the endorsee is bound to strict punctuality in presenting the note for payment, and giving notice, by the earliest opportunity, to the endorser, sought to be charged,

of its dishonoree. Any neglect in either of these particulars will discharge the endorser, without any proof, on his part, of any loss or injury resulting from it. But negligence alone will not discharge a guarantor. He must go further, and show that by it he is injured. *Shewell* v. *Knox*, 1st Dev., 404; *Ashford* v. *Robinson*, 8th Ired., 144; Story on Notes, sec. 400; *Vanevar* v. *Woolly*, 3rd Bar. and Cross., 439, 447. The question was fairly and fully left to the jury, and they found that the defendant had suffered no loss, by any negligence of the plaintiff: and, according to the authorities cited, the plaintiff was entitled to a verdict for the full amount of his claim.

We find no error in his Honor's charge; and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

CHARLES L. GURVIN v. JAMES W. CROMARTIE.

A promise by A., that if B. will marry and have a child by his wife, he will pay him a certain sum, is a valid contract, and, upon the contingency happening, B. is entitled to recover the amount, with interest from the time his child was born.

Appeal from the Superior Court of Law of BLADEN County, at the Spring Term, 1850, his Honor, Judge *Settle*, presiding.

The action is assumpsit on special promises of the defendant's testator, James Cromartie, to pay the plaintiff

$500 in consideration, that the plaintiff would marry and have issue of the marriage; and they are laid in different ways in several counts. Plea, non-assumpsit.

On the trial the case upon the evidence was this: a tract of land was devised to the plaintiff in fee simple, but with a limitation over to another person, in case the plaintiff should die without leaving lawful issue surviving him. In 1843 the plaintiff sold the land to James Cromartie for $1,000, and conveyed it to him by a deed of bargain and sale in fee with general warranty. After the deed was executed, Cromartie said to the plaintiff, who had never been married, "Now, Charles, be smart and get a wife and have a child, and I will give you $500." In December, 1842, the plaintiff married; and, upon hearing thereof, Cromartie said, that he was bound to pay the plaintiff $500, if his wife should have a child. In February, 1846, the plaintiff's wife had a child, and, Cromartie being then dead, the plaintiff gave notice to the defendant, the executor, and requested payment—which being refused, the plaintiff brought this action.

The counsel for the defendant insisted, that there was no consideration to support the promise: that there was no evidence of any assent to the contract on the part of the plaintiff: that the plaintiff had not married and had issue within a reasonable time: and that there was no evidence that the plaintiff was the father of the child his wife had. For those reasons he prayed the court to instruct the jury, that the plaintiff could not recover. But the court refused to give that instruction; and his Honor told the jury, that if they found, that the plaintiff accepted the offer of Cromartie, and in consequence and by reason thereof married, and had issue by his wife at the period mentioned and gave notice thereof to the defendant, he was entitled to recover. The jury gave verdict for $500 with the interest accrued after the demand, and judgment was given therefor, and the defendant appealed.

Strange, for the plaintiff.

W. Winslow, for the defendant.

RUFFIN, C. J. It is not needful to consider of the benefit, which the marriage of the plaintiff and the birth of issue might have been to the testator in preventing the estate, which he had purchased, from going over and making his fee absolute; since, without doubt, marriage is a valuable consideration, and sufficient to support a contract, whether executed or executory. It is generally the sole consideration on which marriage settlements are founded, and it sustains them against the creditors of the contracting parties and purchasers from them. It was so decided by Lord CLARENDON in *Douglass* v. *Waad*, 1 Chan. Cas., 99; and in *Brown* v. *Jones*, 1 Atk., 188, Lord HARDWICKE said, that a settlement on the wife before marriage, though without a portion, is good—for, marriage itself is a consideration. It is most clearly so; for, by the marriage, the respective parties incur duties and obligations to, or in respect of, each other, and the one acquires in the estate of the other, or loses in his or her own, certain rights, which are valuable in a pecuniary sense. So, mutual promises between a man and woman to marry will sustain each other, and the party violating his or her promise is liable to the action of the other, as is often seen. In like manner a promise by one man to another to pay him so much, in consideration that he will marry a certain woman is valid. The same reasons make it so, upon which a marriage settlement is upheld upon the consideration of the marriage. There are many cases of actions on collateral promises to one, in consideration that the promisee will marry a third person. In *Browne* v. *Garborough*, Cro., Eliz., 63, the promise was to a woman, that, if she would marry one R. B. and one J. B. should not assure to them certain land, then the defendant would pay her $100, and the marriage took effect,

and an action was brought thereon by the husband and wife. After verdict for the plaintiffs on non-assumpsit, it was moved in arrest of judgment, that there is no sufficient consideration, as the defendant was a stranger to the *feme*. But the court gave judgment on the verdict, giving as one reason, that it was intended the woman was induced by the promise to marry R. B., which otherwise she would not have done, and peradventure she trusted the defendant rather than J. B. *Bradford* v. *Foder*, Cro. Jac., 228, and *Berisford* v. *Woodroff*, Id., 404, are other instances in which similar actions were sustained. It is true, that in those cases it happened, that the person, whom the plaintiff was to marry, was a relation of the defendant, and that in *Browne* v. *Garborough*, some stress was laid on that circumstance. But it is quite clear, that was not material; for, it is not the benefit that may accrue to the promiser or his relation, which constitutes the consideration in such a case, but the liabilities incurred by the person marrying and the effects the marriage may have on his or her estate, real or personal. Accordingly we find a precedent, 2 Went., 492, in which the declaration was on a promise to pay the plaintiff £7, in consideration that he would marry one D. B., who then had a bastard; and there is another precedent, 2 Chit. Pl., 254, in which the declaration is on a promise to pay the plaintiff a sum named for marrying one E. F., without otherwise describing her as of kin to the defendant, or as under any particular discredit or disadvantage. In *Ex parte Cottrell*, Cowp., 742, a person gave to another a bond to pay him certain sums by installments, in consideration that he would marry a woman, by whom the obligor had several bastard children, and, after the marriage had, the obligor became bankrupt, and the question was, whether the obligee could prove this debt under the commission. A case was sent out of Chancery to the Court of King's Bench for the opinion of the court

of law. The court interrupted the counsel for the creditor by enquiring, what could be objected to the bond; and when the counsel on the other side contended, that the debt could not be proved, because it was not founded on a good consideration, Lord MANSFIELD replied, that the consideration was good between the parties, as it was a stipulation between them in consideration of marriage; the one having performed his part and married the woman, the other was bound to perform his. Those cases and precedents fully establish, that a promise to pay a man for marrying a particular woman will maintain an action, after the marriage had. It follows, that a promise to pay him for marrying any woman, without designating one in particular, is likewise valid; for there is no perceptible distinction on which the law can give an action in the one case and not in the other. It was argued, indeed, that it might be a prejudice to one to marry a particular woman, and by possibility, in such a case, the man would not have married her, had it not been for the promise; whereas marriage generally is to be taken to be to the party's gratification and benefit, and, when he is left at large to his own free choice, his marriage cannot be intended to be to his disadvantage; and therefore, that in this last case the marriage is not a sufficient consideration. But the distinction seems to be entirely untenable; for experience proves, even when the parties are of their own exclusive selection, marriages may or may not be judicious or happy. And it is just as much an act of prudence for a man to refrain from marrying any woman without having a competent livelihood for himself, his wife, and a family, as it is for him, under those circumstances, not to marry a particular woman. In either case he may be induced to marry or not to marry by his having or not having a reasonable consideration. But the law does not enquire whether the party has or has not made a fortunate match, because it is not the adequacy of the con-

sideration, which determines the validity of the promise, but it is the doing of something by the party, to whom the promise is made, and it is a familiar elementary principle, that such act, however trifling, constitutes a sufficient consideration. The act of marriage with any one woman must, in this point of view, be the same as that with any other; and therefore, as far as the objection to the want of a consideration affects the case, the instructions to the jury were right.

It was next said, that the plaintiff gave no such assent to this promise as amounted to a contract between the parties, on which the other party could have an action; and, so, it was void for want of mutuality. That is but presenting the last objection in another aspect, and therefore cannot avail. There are two modes of making simple contracts and declaring on them. The one is, when one party promises to do a certain thing, and in consideration of that promise the other party engages to do something on his part. Then, as nothing is done but the making of the promises, it is absolutely necessary, that mutual valid promises, amounting to an express contract, should appear; otherwise, one of the parties might claim the benefit of the promise of the other, without in return doing any act or being liable for any loss whatever. And in such a case it is necessary only to set out the mutual promises, without averring performance on the part of the plaintiff. The other mode is, when one party promises, in consideration that the other will or will not do some act. Then, no mutual promise need be set forth or exist; but it is necessary and sufficient to show the act done. It is not requisite, that it should appear, the plaintiff might have been sued for not doing the act; for he may recover after the thing done, though it was at his election whether he would do it or not up to the moment of its execution. Thus in an action on a promise to pay the debt of another in consideration of forbearance, the

declaration sets forth no agreement of the plaintiff to forbear, but only the promise of the defendant to pay up on the consideration of forbearance for the particular time, and, then, that the plaintiff, confiding in the defendant's undertaking, did forbear during the prescribed period. In like manner are framed the precedents upon promises to pay one for marrying a particular person. They set forth, that in consideration that the plaintiff, at the instance of the defendant, would marry A. B., the defendant promised the plaintiff to pay, &c., and that the plaintiff confiding in the promise, afterwards married, &c. In no instance is there an averment, or is it set forth as a part of the consideration, that the plaintiff agreed to marry, excepting only when the action is between a man and woman for breach of promise to intermarry. The declaration alleges merely, that the plaintiff in fact married, and that thereupon the action arose upon the defendant's promise. For in all such cases, it is the intendment of the law, that the marriage was induced by the promise, and therefore it is not necessary to aver or prove that it was done at the instance of the defendant. *Berisford* v. *Woodroff*, Cro. Jac., 404; *Poynter* v. *Poynter*, Cro. Car., 194; *Bockenham* v. *Thacker*, 2 Vent., 71. There is, however, another case, which presents a remarkable instance of the validity of a promise by one person to pay a sum of money for an act done by another, when no other person is or can be found to do the act, the right to claim the benefit of the promise arises simply from the performance of the act by any person and without any previous communication with the defendant. It is that of the promise of a reward for apprehending a felon, discovering lost goods, or the like; in which the promise is deemed to be a continuing one and to be binding in favor of any person, who afterwards acts upon it. *Williams* v. *Carwardirel*, 5 Car. & P., 566, and 4 Barn. & Ad., 621. And the precedents of declaration upon such offers of reward aver merely,

that the plaintiff, upon the faith of the offer, did the service, and that the defendant had notice thereof. 3 Went. 30. It was not necessary, therefore, that the declaration here should have averred more than it has, or that there should have been any engagement by the plaintiff to marry, in order to entitle the plaintiff to recover upon his marriage and the birth of a child.

As to the objection, that these things were not done in a reasonable time, there is nothing in it. The contract specified no time within which the marriage and birth of issue should occur; and, from their nature, the party had his lifetime to perform them, and, upon performance completed, could claim the compensation agreed on—at least, unless, before any act done by the plaintiff towards performance, the other party had retracted his offer.

The last ground of exception was, that the plaintiff did not prove, that he was the father of his wife's child; and to that was added here, that an enquiry on that point would be indecent, and therefore, also, that the promise ought not to entitle the plaintiff to an action. The answer is, that there is legal evidence of the paternity of the child; as it is matter of law, that the husband, who co-habits with his wife—and nothing to the contrary was suggested here—is presumed to be in fact the father of the wife's issue. Then, as to the notion of the indecency of investigating an inquiry into the legitimacy of the issue, it seems to the Court to be entirely unfounded. This is not a case of a wager between two persons upon a question involving the feelings of others or naturally calculated unnecessarily to produce indecent enquiries. On the contrary, it is a promise to pay one a certain sum in consideration of marrying and having issue of the marriage; which is a very common contingency, upon which estates devised are enlarged or defeated, and it is also a contingency on which almost all the limitations in marriage settlements depend. They can offend the feelings or delicacy

of no one, but are contingencies naturally connected with the proper provisions for a family, and therefore they almost always give rise to important limitations in settlements. The present is a transaction much of the same nature; whereby the plaintiff, who was single at the time, was to become entitled to demand a particular sum from the testator, upon his future marriage and the birth of issue.

PER CURIAM. Judgment affirmed.

ALEXANDER KELLY v. JESSE F. MUSE.

Where there is a judgment against two or more, an appeal cannot be granted unless all the defendants join in the appeal.

The cases of *Smith* v. *Cunningham*, 8 Ired., 460; *Donnell* v. *Shields*, 8 Ired., 371; *Dunn* v. *Jones*, 4 Dev. and Bat., 154; *Gilliam* v. *Hicks*, 4 Dev., 217; *Jones* v. *Ross*, 2 N. C. Law. Rep., 450, and *Brown* v. *Conner*, 10 Ired., cited and approved.

Appeal from the Superior Court of Law of MOORE County, at the Spring Term, 1850, his Honor, Judge *Settle*, presiding.

The plaintiff warranted four defendants, Muse, Spivey, McNeill, and McDonald, on a former judgment for $40, and on the 1st of January, 1837, judgment was rendered against the four for debt, interest, and costs. The justice then made this entry: "The defendant, Jesse F. Muse, no other defendant in the case being present, prays an appeal, and it is granted, by giving for surety one Will-

iam D. Harrington." In the county court several pleas were put in generally for the defendants, and the cause pended until July, 1847, when Spivey came into court and declared that the appeal had been taken and prosecuted without his consent or knowledge, and moved to dismiss the same. The court refused the motion; and then the plaintiff moved to dismiss the appeal. But the court refused that motion, also, and the plaintiff appealed. The superior court at the next term refused to take cognizance of the plaintiff's appeal, and dismissed it, and remanded the case with a writ of *procedendo* to the county court. At July term, 1849, the plaintiff again moved the county court to dismiss the appeal from the judgment of the justice of the peace, upon the ground, that it was a joint judgment against four defendants, and one of them only appealed; which motion was overruled, and the plaintiff appealed. At February term, 1850, the superior court reversed the last decision of the county court, and allowed the motion of the plaintiff to dismiss the appeal, upon the ground stated by the plaintiff, and thereupon the defendant, Muse, by consent, was allowed to appeal to this court.

Kelly, for the plaintiff.

Mendenhall, *Haughton*, and *Winston*, for the defendants.

RUFFIN, C. J. The decision of his Honor, from which this appeal was taken, is in conformity with the judgments then recently given by this Court in the case of *Smith* v. *Cunningham*, 8 Ired, 460, and *Donnell* v. *Shields*, 8 Ired., 371, and was, probably, founded on those judgments. Of course, as a majority of the Court concurred in them, his Honor's decision must stand affirmed, unless the minds of those Judges can be fully convinced, that they were, before, wrong. As that is not the case, it would ordinarily be sufficient to refer to the previous cases. But

as there is not now an unanimity among the Judges, it is, perhaps, proper, that the reasons, which govern the majority, should be stated a litttle more at large. Upon recurring to the cases mentioned, it will be perceived, that they occurred in 1848, and that the whole Court at that time united in them; and also that they professed to follow, and, in fact, do follow a rule laid down upon this point in the earlier cases of *Dunn et al.* v. *Jones*, 4 Dev. and Bat. 154, and *Gilliam* v. *Hicks* 4 Dev., 217—the former of which occurred in 1838, and the latter in 1833, at which periods two other Judges sat in the Court, and the Court was then also of one mind. It is also a fact well known, that the case of *Hicks* v. *Gilliam* was decided in conformity with the previous general opinion and the established practice of the profession. Under such circumstances the Court does not consider it allowable now, whatever might have been the opinions *ab origine* of the Judges individually, to overturn a rule and principle laid down and acted upon, as the ground of decision of the rights of persons, in such a series of cases. The importance of adhering to well considered judicial precedents, running through several generations of lawyers and judges, can hardly be overrated. It is difficult duly to estimate it, except by turning one's mind to the mischiefs, which would arise from a total disregard of them, and the misery to a people, who could not tell what the law was, under which they were living, until they took the opinion of the judge for the time being upon every particular question. That would, indeed, be both a new and a dangerous principle; one which the Court cannot adopt. But the majority of the Court must acknowledge, that, as it seems to them, the old decisions are right, which do not allow an appeal to one of two or more defendants from a joint verdict and judgment. It is true, hardships not unfrequently grow out of the rule; and it must not be supposed that the Judges hitherto

have not been aware of them, and willing to prevent them, if they could. In some of the cases the hardship was as great as it could be—for example, in *Donnell* v. *Shields*; and observations were made on the hardship with the view of calling the attention of the legislature to it. But the grievance has ever been found to be beyond the reach of the judicial function. If to be remedied at all, it requires the power of the legislature: and we are persuaded, that, whenever the attempt shall be made, the subject will be found to be one, which will require much caution and consideration to provide a fit remedy without producing or opening the way for greater mischiefs than those obviated. At all events, the courts have no power of legislating upon the subject. The statute gives the right of appeal, and by it annuls the judgment appealed from, and directs a trial *de novo* in the appellate court, except in appeals to the Supreme Court. How is it possible a court can say, that as to one of the persons, against whom the judgment was given, it is annulled, but not as to the others? The language is the same as to appeals by defendants and by plaintiffs. Now, if one defendant can have an appeal, how can it be denied to one of the two plaintiffs? We do not say, that the two cases ought to be governed by the same rule; that is for the legislature to determine. But it seems to us, as a matter of judicial construction of a statute, or of judicial authority independent of a statute, an action standing for trial on issues before a jury, cannot in this state be split up, so that different parts of the case will be in different courts at the same time, in the one instance more than in the other. It has been supposed that the court is at liberty to do so, upon what is called a new principle, laid down by the legislature, namely, that contracts shall be deemed joint and several, and that actions may be brought accordingly. But, clearly, that cannot affect rights, to which that principle has not been applied

by the legislature, or alter the constructions of statutes previously existing. If the legislature adopts a new policy, the courts must enforce it as far as the enactment commands or authorizes. But they cannot carry the principle itself farther than the legislature has carried it, so as to make it reach cases which the legislature would not venture to touch. When a statute authorized an appeal from a judgment against two upon a joint contract, it followed, upon the principles of common law, that there could not be an appeal, unless both defendants joined in it; because the judgment could not be for one and against the other, but must be for both, unless it were against both. There, another statute authorizes a creditor to sue on a joint contract as if it were joint and several—that is, to sue all the parties together or separately. When the creditor sues jointly, surely it is not for the defendants, or one of them, to say, that the creditor shall be deprived of that privilege, and each of them be allowed to appeal and turn the joint action into several ones. Nor can the court allow, without some statute to help them, that upon a judgment against two, the plaintiff may take out several executions as upon two separate judgments. The symmetry of the law would be completely marred thereby. It is true, that, when an action *ex contractu* is brought against two, there may be a verdict and judgment for one and against the other, as was held in *Jones* v. *Ross*, 2 N. C. Law Rep., 450; and that seems to have been carrying the construction of the act of 1789 very far—farther than, on principle, it ought to be carried; because it allowed of a variance between the declaration and evidence, by permitting the plaintiff to recover on the several contract of one, when the issue is, whether the two contracted together. But it was so decided, and so long decided and acted on, that in *Brown* v. *Conner & Long*, 10 Ired., 75, the Court deemed it a duty to submit to it. Yet that

decision by no means affects the construction of the statutes granting appeals, or alters the rule of law as to the process to be sued out on joint judgments. A particular enactment, altering the law in one point or on one subject, cannot be judicially extended to other points and other subjects, not within the purview of the act; but each statute is necessarily to be construed in reference to the previous law upon the subject of that act, the mischief, and the remedy provided by the act. The acts granting appeals form a system of law upon that subject, and are to be construed upon their own terms and such reasons as apply to that particular subject; and, as it seems to the majority of the Court, the point is concluded by authority and entirely supported by reason, that an appeal, on which another trial by jury is to be had, cannot and ought not to be taken by one of several defendants, by himself, so as thereby to split up the cause into several parts, and greatly multiply costs.

It must, therefore, be certified to the superior court, that there is no error in the order of that court, from which the appeal was taken to this Court: so that the superior court may remit the case to the county court, with directions to dismiss the appeal to that court from the judgment of the justice of the peace, to the end that the plaintiff may have execution of the judgment given by the justice of the peace.

PEARSON, J. This case presents the question, is a judgment against two or more joint? or is it joint and several, and to be treated in its consequences, as if the defendants had been severally sued?

The decision of *Trice* v. *Turrentine*, and *Jackson* v. *Hampton*, at the last term, was put by me upon the ground, that the acts of 1789, 1796, and 1797, were intended to do away with the hardships, growing out of the doctrine of joint obligations, joint judgments, and survivorships; and

had made a change in the law by abolishing the principle of the English law as to joint judgments, and introducing the principle, that the defendants in a judgment are to be treated, as if they had been "severally sued," whenever the ends of justice required it. And I ventured the opinion, that as we had, by a liberal construction of these remedial statutes, adopted a *new principle* and got rid of all those hardships, except one, (which is the one involved in the present case,) it was wiser to rid ourselves of that also, by overruling the cases which adhere to the *old principle*, than to embarrass the law, by attempting to sustain those cases by distinctions "too fine for use."

This case made it necessary to review that opinion. I have performed the duty most anxiously, and the result is, a clear conviction of its correctness.

My position is, that the statutes referred to, changed the law and introduced a new principle; that this new principle has been acted upon by the legislature and has been adopted by this Court, in two cases, which have never been drawn in question, and which directly conflict with the class of cases adhering to the old principle; and that to relieve ourselves of the confusion, in which we are now involved, and the great confusion, to which we will be exposed in future, it is necessary to adopt the one principle or the other by overruling the cases which adhere to the old principle or the cases which adopt the new principle. If this necessity exists, no one will contend that the new principle should give way to the old one, with all of its absurd consequences.

The old principle is, that all of the defendants are "a unit" and make but one, or, as it is elsewhere expressed, "though they are several persons, yet they make but one defendant, when jointly sued." 6 T. R., 525.

As a consequence of this principle, all of the defendants must join in an appeal, and the plaintiff, to fix the bail of

one, must first run a *ca. sa.* against all. Now, by the cases of *Trice* v. *Turrentine*, and *Jackson* v. *Hampton*, as decided at the last term, the plaintiff is relieved from the hardship of being obliged to run a *ca. sa.* against all of the defendants; and the cases of *Trice* v. *Turrentine*, and *Waugh* v. *Hampton*, 5 Ired., 241, which adhere to the old principle, are overruled. It is true, the two Judges, who make the decision, do not agree as to the ground upon which it is put. The one adopts a new principle and gives the relief directly: the other gives the relief indirectly, by allowing the plaintiff to instruct the officer not to execute the writ upon one; still the result of the decision is to relieve the plaintiff from a hardship, which is a consequence of the old principle, and it must weaken the authority of the only class of cases which still adhere to it; for, if the plaintiff is relieved from one of the consequences, a portion of the defendants should be. It was the plaintiff's act to sue both, in one action, instead of having two actions, and the judgment in those cases remained as to all of the defendants, unreversed and in full force: whereas, in this case, the defendant had no option as to whether there should the two warrants or one, and the judgment would be vacated as to one, if the appeal is allowed, leaving it in force as to the other, just as if there had been two warrants. And if the plaintiff, in the one case, is relieved from the consequence of his own act, the defendant in the other ought not to be prejudiced, by the accident, over which he had no control, that the plaintiff had sued both in one warrant, instead of having several warrants against each.

At all events, this is a favorable occasion to assail the old principle, and I now proceed to sustain my position. By the old principle, if, pending a suit and *before* judgment, one of the defendants died, his executor or administrator could not have been made liable, although he was the only solvent defendant. The act of 1797 provides,

that, in such case, such process and judgment may be awarded against the executor or administrator of the deceased defendant as if he had been "sued severally." Here *the new principle* is announced, and is applied to one case, so as to relieve against a hardship of the old principle, and the question is, shall this new principle, by a liberal construction of these remedial statutes, be extended to all cases coming within the same mischief, so as to relieve against all the hardships? or are we to "stick to the letter" and confine the relief to the cases expressly provided for?

The legislature has acted upon the new principle. The act of 1820 provides, that if more suits than one be instituted against several obligors, the suits, on the return of the writs, shall be consolidated. Now, the lawmakers must have supposed, that the old principle and its consequences had been abolished, and that the new principle, by which the defendants are to be treated as if "severally sued," was in force, or else they intended manifest wrong; for, by the old principle, the plaintiff could not proceed against the bail of each, as he could have done, if his suits had been let alone; and if one of the defendants had died *after judgment*, the plaintiff had no remedy against his representative; and, on the other hand, the defendants, after the consolidation, must all join in an appeal; whereas, if the suits had been let alone, each defendant had the right to appeal: and upon the supposition, that the old principle was in force, all these hardships were imposed upon the parties, by a wise legislature, to save a little cost,

Again, the act of 1844 provides, that no *ca. sa.* shall issue, unless the plaintiff makes oath that the defendant conceals his property. This shows conclusively, that in the opinion of the legislature, the defendants are to be treated as if they had been "severally sued:" for, if the defendants are "a unit," a fraudulent debtor must go free,

if he has an honest co-defendant, as to whom the oath cannot be made. It is a condition precedent, and no officer would be justified in issuing a *ca. sa.* against both, upon an oath as to one.

In *Jones* v. *Ross*, 2 N. C. L. R., 450, (1816) it is decided, that in an action *ex contractu*, judgment may be *against* one and in *favor* of the other defendant. This is directly opposed to the old principle; and by a liberal construction of the statutes, referred to, the new principle is adopted, and each defendant is treated, as if he had been "severally sued," and this in favor of the plaintiff, who elected to join the two in one action.

So in the case of *Smith* v. *Fagan*, 2 Dev., 298, (1830,) it is said "it is the policy of the authorities of the country to extend the principle of the act of 1789, as far as will *completely* remedy the evils at common law," and it is held that the old principle, that a judgment is joint, so that, if one defendant dies *after* judgment, it cannot be enforced against his estate, is changed, by a liberal construction of those statutes, which apply to judgments, as well as to obligations strictly so called. Here, the new principle is adopted, and the defendants are treated as if they had been "severally sued," and this too in favor of the plaintiffs. Now then, can it be insisted, that the old principle should be adhered to so as to subject defendants to its hard consequences? They have no election as to whether there shall be one writ or two; and it is but reasonable, that although the plaintiff chooses to include them in the same writ, they should be treated and allowed the same rights, as if they had been severally sued. These two cases adopt the new principle, and have been acted upon by the courts and the profession ever since. Scarcely a court is held, where judgment is not rendered against one defendant and in favor of the other, and where the representative of one defendant, who died *after judgment*, is not proceeded against, and it is done so much as a matter of course, and

with so little question, that many practitioners are not aware of the fact, that under the old principle the law was to the contrary.

The old principle is adhered to in only one class of cases, *Hicks* v. *Gilliam*, and six other cases which follow it, where it is held, that as the defendants are a "unit," all must join in one appeal, and if one refuses, the others must lose their rights, without hope of relief.

The new principle is adopted in two cases, which have never been questioned. The old principle is adhered to in one class of cases, seven in all, but the authority of these cases, (as they all stand upon the same ground) is weakened by the formidable array of numbers. The new principle, adopted in *Jones* v. *Ross*, and *Fagan* v. *Smith*, was so much in accordance with the sense of the profession and the common idea of justice, that these cases have never since been questioned, while the old principle, which is acted on in *Hicks* v. *Gilliam*, was so much at variance with the sense of the profession and led to such hardships, that it was not only questioned, but sent up to this Court, sometimes under one aspect and sometimes under another, and the present is the eighth time that this Court has been appealed to for relief. The struggles of the profession and of the public against the old principle, have been like the convulsive efforts of a strong man, seeking to relieve himself from a weight, with which he is oppressed.

That these two sets of cases cannot stand together is self evident. The one adhere to the old principle, that the defendants are a "unit;" the other adopts the new principle, that the defendants, although sued together, are to be treated and have the same rights as if "severally sued." That confusion will grow out of contradictory decisions, based upon these inconsistent principles, and that there is a necessity to adopt the one and reject the other, is painfully exhibited by the cases of *Trice* v. *Turren*,

tine and *Waugh* v. *Hampton*, overruled by *Trice* v. *Turrentine* and *Jackson* v. *Hampton;* and the case of *Brown* v. *Conner*, 10 Ire., 75; there the defendant was made to feel the weight of both these inconsistent principles, being sued with one Long, and judgment in the county court being rendered against both, according to the old principle, they were forced to appeal jointly. In the superior court it was proven, that Conner was not liable for the debt, and a verdict was rendered in his favor, and he had judgment for his costs, and that he go without day; but, according to the new principle, and on the authority of *Jones* v. *Ross*, judgment was rendered against Long; and the result was, that judgment was rendered against Conner upon the appeal bond, and he had to pay the plaintiff's debt and costs, notwithstanding there had been a verdict and judgment in his favor; and such must be the hard fate of all defendants, until the one principle is adopted and the other is wholly rejected.

I should not feel at liberty to insist upon overruling the cases of *Hicks* v. *Gilliam*, and the other cases, which follow it, but for the fact of their being directly opposed to the two acts of the legislature and the two cases to which I have referred, and to which must now be added *Conner and Brown.* This, I think, not only justifies, but makes it necessary, to overrule them.

No one can read the case of *Brown and Conner*, and say, the law ought to stand as it does. That case was correctly decided. The conclusion is logical: there was no escape from it, without overruling *Jones* v. *Ross.* That had been attempted in the superior court; but this Court sustained it, and, *in doing so*, *overruled Hicks* v. *Gilliam*, for the two cannot stand together.

The defendants are a "unit" and must join in an appeal. After *they join* in an appeal they *cease to be a*

unit, and the plaintiff is entitled to judgment against one, although he shows no cause of action against the other. Is it right to let this state of things continue?

I am not in favor of judicial legislation. Where new combinations of circumstances and changes in the state of society develop defects in the law, it is the province of the legislature to remedy these defects. But where a defect is occasioned by a train of decisions, all involving the same error, it is the duty of the Court to remedy this defect, because it is the consequence of its own wrong action and it should correct its own error, and should not continue in error, until "confusion becomes worse confounded," in the hope that the legislature will extend its omnipotent arm and help the Court out of a difficulty of its own creation.

The Court not only has power to correct its own error, but it is most proper that it should do so; for, knowing the source and extent of the error, it can best apply the remedy—whereas, the Legislature, not knowing the case "in all of its bearings," may handle the subject too roughly; and while applying the remedy to one evil, may affect injuriously important principles in other parts of the system.

PER CURIAM. Judgment affirmed.

HENRY HILL v. STEPHEN DOUGHTY.

Where one had a claim against three distributees, on account of assets received from an intestate's estate, and they jointly promised, verbally, that they would pay the debt; *Held*, that this promise was void under our statute, being only oral, because each of the defendants was liable separately in proportion to the assets he had received, and by this promise each made himself responsible for the liability of the others.

Appeal from the Superior Court of Law of BEAUFORT County, at the Spring Term, 1850, his Honor, Judge *Bailey*, presiding.

The action is assumpsit, and non-assumpsit pleaded; and it was decided upon the following case agreed:

In May, 1829, Thomas Doughty was appointed the guardian of John Doughty, an infant, and gave bond with George Hill as a surety. Thomas Doughty died in 1830, intestate, leaving three infant children, the two defendants and a daughter, who were his next of kin. William E. Smaw was appointed the guardian of the infants in 1835, and in 1838 he was also appointed the administrator *de bonis non* of Thomas Doughty, and received assets of his intestate. When the defendants came of age Smaw settled with each of them, and paid to each his share of the estate, without taking any refunding bond. In 1847, John Doughty brought suit on the guardian bond of Thomas Doughty against Smaw, as his administrator, and against Henry Hill, the present plaintiff, as the executor of George Hill, who was then dead; and the damages were assessed to $100 for a balance due to the ward, and judgment endorsed accordingly. A *fieri facias* was issued

thereon in September, 1849, and on the first day of December following, the present plaintiff paid the same. He had before that time settled his accounts as executor and paid to sundry legatees all the estate, except such parts as were given to him by the will, which he retained as his own legacy. At the time of the suit brought by John Doughty, Smaw and the sureties to his administrator's bond were insolvent, and have been ever since. While the execution was in the sheriff's hands, the attorney of the plaintiff, Hill, informed the present defendants, "that he had been instructed to commence proceedings, to subject them to the payment of the amount recovered, upon the ground that it was a claim against their father's estate and they had his property;" and the defendants then promised the attorney, that if he would not commence proceedings against them and run them to costs, they would pay the execution at or before its return; and the attorney informed the plaintiff thereof, and was instructed not to commence any proceedings against the defendants, until after the return of the execution. The defendants did not say expressly, that each of them would pay a part of the demand, though they remarked, that their sister was equally liable, and they said, they would make her pay her proportion. Both of the defendants, however, when together, told the attorney, as aforesaid, that "they would pay the judgment and execution."

It was agreed, that, if the opinion of the court should be for the plaintiff, he should have judgment for $124 and the costs: and that, if the court should be of a contrary opinion, there should be judgment as of nonsuit. Judgment was given for the plaintiff accordingly, and the defendants appealed.

J. H. Bryan and *J. W. Bryan*, for the plaintiff.
Donnell, for the defendant.

RUFFIN, C. J. Several objections were taken at the bar to the recovery: but it is sufficient to consider one of them, as the Court deems that fatal. Supposing, then, that the action is properly brought in the individual capacity of the plaintiff, and also that the promise is to be deemed joint and not construed with reference to the previous several liabilities of the next of kin; still the action will not lie, because the promise was not in writing. The argument for the plaintiff is, that the defendants were bound in equity to exonerate the plaintiff from the payment of the judgment, or to reimburse to him what he might pay on it: and that such a liability will support an express promise to pay the money. Without saying how far next of kin may, on account of distributive shares received, be liable in equity to creditors upon the *devastavit* and insolvency of the administrator, and admitting such liability for the purposes of the present question, and also that an equitable liability will sustain an express promise at law, yet it will not follow, that this verbal promise by two of the next of kin will maintain this joint action against them. If an equitable liability be a good consideration, it is so as far only as the liability went; for even forbearance will not uphold a promise to pay an unfounded demand. If, then, a court of law can recognize an equitable liability as a consideration for a promise, it must follow, that the Court is obliged to determine the extent of the liability, in order to ascertain, how far it is a sufficient consideration, and also whether the promise, founded on it, is such an one as may be oral or must be written—in other words, whether the equitable liability was that of the party promising, or of some other person. For the statute, which requires a promise to answer the debt of another to be in writing, must, of necessity, be construed to mean all debts, whether legal or equitable. Now, the liability to creditors of the defendants and their sister, as next of kin, was not joint,

but arose, if at all, by reason of that portion of the assets of their father, which came to their respective hands as their several shares of the estate. Each was therefore liable for only an equal proportion of the money; at all events, in the first instance, and while the others were able to pay their parts, which is not questioned here. Hence, it is obvious, if one of the defendants had verbally promised to pay the whole of this demand, that the promise would not have been binding, under the statute of frauds, beyond his own one-third: for, beyond that, the liability was not his own, but that of another. It seems clear, that an undertaking by the defendants in a joint form to pay the whole debt cannot alter the rule of law or the legal effect of the promise as to each, in that respect. For, if two persons owe another separate debts, then joint oral promise to pay both debts, cannot sustain a joint action, since it is a promise by each to answer for another in respect to all but his own original debt. Therefore the plaintiff cannot have judgment in this action: not against both defendants, as there is no valid joint promise: nor against the defendants separately, as the plaintiff cannot have judgment against one defendant for a part of his demand, and against the other for the residue.

PER CURIAM. Judgment reversed and judgment of nonsuit.

DEN ON DEMISE OF CLEMENT JOHNSON v. JAMES FARLOW.

When a deed from A. to B. calls for the line of an adjoining tract, testimony cannot be introduced to control that call by showing that, at the time of the execution of the deed, they ran to a different line; that B. afterwards said this last was his line, and that A. and those who claimed under him cultivated for many years up to this line.

Appeal from the Superior Court of Law of RANDOLPH County, at the Special Term in July, 1849, his Honor, Judge *Battle*, presiding.

Morehead and *Iredell*, for the plaintiff.
Winston and *Mendenhall*, for the defendant.

PEARSON, J. *In* 1767, Henry E. McCulloch, conveyed to one Thomas King a tract of land, which is represented in the annexed diagram by the parallelogram A. B. G. O.

In 1794, a grant issued to one McCrackin for the tract of land represented by these letters, T, X, G, R, D, G, J, P, Q, R, S, (at G.) The grant calls for a post oak, *then North* 62 deg. *East*, 27 *chains to a black oak*, (at R,) then East 49 chains, to a *stake in King's line* (at D,) then North 29 chains to a black oak, his corner (at G,) then East 39 chains to a stake (at J) and around to the beginning.

In 1797, King conveyed his tract of land to one Laughlin.

In 1801, Laughlin conveyed to McCrackin the land represented by the letters L. E. H. O, which was the Northern part of the land deeded to King by McCulloch and a

small part of McCrackin's own land represented by the letters D. E. H. G. The deed begins at a poplar (at L.) thence West 130 poles to a corner post oak (at E,) on the next side of the tract, thence North 130 poles to a stake (at H,) thence East 130 poles to a stake (at O,) thence South to the beginning.

In 1807, McCrackin conveyed to one Andrews the land represented by the letters F. (or M.) N. U. Z. G. R. E. (or D.) The deed calls for a post oak in the original line at Z., thence South 30 chains to the old corner post oak (at G.) *then North* 62 deg. *East* 27 *chains to a black oak* (at R.) *then East* 49 *chains to a stake in King's line* (at E. or D.) then North to the beginning. The lessor claimed under Andrews, and the only question in the case was, did the deed from McCrackin to Andrews, in the call from the black oak (at K.) "*thence East* 49 *chains to a stake in King's line*," run to D. or did it stop at E.? It was proven that there was a post oak at E. marked as a corner, which corresponded in age with the deed from Laughlin to McCrackin in 1801, and a witness swore, that in 1807, when the deed was made by McCrackin to Andrews, a survey was made and they ran the line from K. to E. and from E. to H., and that after his purchase Andrews said, that a fence on the line E. H. was on his line. Several marked line trees were found on the line E. H. It was also proven that McCrackin, after he conveyed to Andrews, cultivated up to the fence at E. H. for several years, and that Morrison, under whom the defendant claims, after he purchased in 1818, continued to cultivate up to the same fence, until the year 1821 or '2, when it was turned out and permitted to grow up as an old field. The defendant claimed under one Morrison, to whom McCrackin conveyed in 1818.

His Honor charged, "that King's limiting the line B. D. G. according to the original calls, the plaintiff would be entitled to recover, unless the defendant could show, that it had been subsequently established elsewhere; that when McCrackin purchased the upper part of the King grant from Laughlin in 1801, he owned the whole land, and it was competent for him then to run the line E. H. and establish it, as the line between his original grant and the land purchased of Laughlin. And if the jury believed he did so, that line then became the King line, and would be the line called for in the subsequent deeds, unless there was evidence to show, that it had been afterwards run and established at another place of which there was none. To establish the position, that it was competent for McCrackin to establish the line E. H., upon his purchase from Laughlin, the court remarked, that if he purchased a part of his own land, he would be estopped from saying it was not Laughlin's, because he had by his own deed established the line E. H. The court told the jury, they were to enquire whether the evidence satisfied them that the line E. H. was established in 1801, and if so, they would find for the defendant. But if the evidence preponderated in favor of the line B. D. G. they would find for the plaintiff."

His Honor was correct in the position, that B. D. G. being ascertained to be the King line, the call in the deed to Andrews from K., "then East 49 chains to a stake in King's line," must go to the line B. D. G., unless there was something to control it. We think there was nothing to be submitted to the jury as sufficient, if true, to have this effect. There was error in submitting the question to the jury, instead of charging that there was nothing to control the call.

Admit that in 1801, when Laughlin made his deed to McCrackin, the line E. H. was run and marked and established as the line up to which Laughlin conveyed to

McCrackin, that fact cannot control the call in the deed to Andrews, for it was a matter between Laughlin and McCrackin, and although McCrackin has a right to make a line on his own land when he pleased, yet the fact of his doing so could not make that line "the King line," so as to have any effect in a deed which he afterwards made to Andrews, inasmuch as the establishing of this new line is in no manner recognized or referred to in the deed —the calls are the same as those in the grant to McCrackin—and no allusion is made either to the fact that McCrackin had purchased land of Laughlin or to the fact that the line E. H. had been run and marked. The deed to Andrews does not connect him with these collateral acts, and his title cannot therefore be affected by them.

The testimony that when McCrackin sold to Andrews, a survey was made and they ran from R. to E., and from E. to H.; that Andrews afterwards said the fence at E. H. was on his line; and that McCrackin, and those, under whom the defendant claims, cultivated for many years up to this fence, cannot have the effect of controlling this call in the deed. It would not be admissible for the purpose of controlling "corner and distance," and, *a fortiori* "it cannot control a call for the line of an adjoining tract."

We are not certain that we comprehend the meaning of his Honor, in what he says, about an estoppel. But we are certain, that the doctrine of estoppel has no application in this case, and the plaintiff has a right to complain of the allusion made in reference to it, as being apt to mislead the jury. It may be, that as between Laughlin and himself, McCrackin was estopped from denying, that he had purchased up to the new line, which they had established. But in the same way he was estopped from denying that the State had granted to him up to the King line, and so there was an estoppel against an estoppel, which left the matter "at large." After Laughlin had

made the deed, he had nothing more to do with it. The idea that McCrackin was estopped, as against himself, is absurd, and his Honor could not have intended to express it. The truth is, that after McCrackin had become the owner of all the land, he had a right to sell off to Andrews just as much as he pleased; and the only question was, how much did he convey? His deed says he conveyed up to the King line and there was nothing to control it, and give to it the same legal effect, as if it had called for the *line established* by the deed from Laughlin to McCrackin, which is not referred to, and with which Andrews and the lessor of the plaintiff, who claims under him, were in no wise connected. So the doctrine of estoppel was not involved in the case, and the allusion to it had a tendency to mislead the jury.

There must be a *venire de novo*.

PER CURIAM. Judgment reversed and *venire de novo*.

WILLIAM IRIONS v. JOHN COOK.

Where A., a citizen of North Carolina, appointed B. in Tennessee, to lease for him a certain tract of land in the latter state, and B. accordingly leased it, but the lessor, not being willing to trust A., required B. to give his own note for the rent, which he did and he afterwards paid it; *Held*, that this was an undertaking by B. within the scope of his general authority; that A. was bound to reimburse him, and that it was not necessary for B. to give to A. any notice of the payment, to entitle him to an action against A. for the money so paid.

Appeal from the Superior Court of Law of NASH County, at the Spring Term, 1850, his Honor, Judge *Manly*, presiding.

IRIONS *v.* COOK.

This was an action to recover $130, with interest from December, 1847. The plaintiff declared in assumpsit in several counts. 1st. Specially on the case. 2d. As agent of the defendant upon a contract of indemnity. 3d. For money paid to the use and at the request of the defendant. 4th. As between debtor and creditor for money laid out and expended at the instance and for the use and benefit of the defendant.

In the progress of the trial, it was proposed to read depositions taken on the fifth and sixth of January, 1849. Their admissibility was objected to, on the ground, that the *notice* of place was not specific enough. The objection was overruled. In the deposition of John W. Mathews, he states, that he saw Irions pay Blackwell the sum of $130; and it was explained at the time of the payment, in conversation between them, to be for the rent of the land, taken for the defendant's use. This conversation was objected to, but overruled. The proofs are in depositions and letters.

The defendant contended: 1st. That the agent had no authority to obtain the land upon his own credit; and making a contract of this sort and paying the money without request could not give him a right of action. 2d. That the plaintiff could not at any rate sue without a previous notice of the demand.

The court instructed the jury, if the defendant gave Irions general instructions to rent the land in question for him, without directing in what particular manner it should be done, and it became necessary in order to attain the object, for the agent to make himself primarily responsible, it was within the range of his power to do so. And this he might do as well in case where his principal was known to the other as where he was unknown. And if the agent, Irions, contracted as above supposed, or by his own credit, for the land, and kept it for his principal during the year, and has paid the rent according to contract,

he is entitled to recover it back with interest. And no notice of the demand or of suit is requisite in such case previous to action.

LOUISBURG, N. C., January 11th, 1846.

MR. JONES: Your letter of the 25th came to hand last night. I was glad to hear from you and your family. I got home the 20th of last month, but would have got home sooner, if I had come straight on. I stopped nine days at my brother's in Georgia, and left him anxious for me to stay longer with him, but could not. I have bought you a blacksmith. They tell me he is a good one. He is about 25 years old. If you will take him, you can get him for $800 : and if you don't want him, my brother will take him at that price. You may have refusal. I don't know when I shall start to Tennessee, but will come as soon as I can. If you don't see me by the 1st of March, I shall be there by the first of the fall. Tell Mr. Irions I am much obliged to him for his kindness to me, as I did not know but what I came up to my promise. If I don't get to Tennessee before the fall, I shall want the place he has rented for me. Tell him not to let it go, as I shall want it. My father's health is very bad at this time, but I think it will be so I can take him out next fall, &c.

Signed "JOHN COOK."

To "THOMAS C. JONES."

NASH, J. Several exceptions were taken by the defendant to the competency of the evidence, offered by the plaintiff and admitted by the court. The first is, as to the admissibility of the depositions—the notice under which they were taken being, as insisted, not sufficiently explicit. Without passing any opinion upon the point raised, it is sufficient that there was a cross-examination by the defendant. As the object in giving notice, is to

enable the party to prepare for the examination and to attend if he thinks proper, if he does attend and cross-examine the witness, a waiver of the notice is to be presumed and the deposition is well taken without showing any notice—the very object of giving it is attained. *Beasley* v. *Downey*, 10th Ired., 286.

The next exception is, as to the conversation between Irions, the plaintiff, and Blackwell, the person from whom the land was rented, which was made at the time the rent was paid. The plaintiff took a receipt from Blackwell for the money, the parties then stating for what it was given. It is a familiar rule of law, that declarations made by a party at the time a particular transaction takes place, are *pars rei gestæ*, a part of the transaction, as explanatory of it. It is true, parol evidence cannot be received, to vary or alter a written contract; but this is a receipt and may be explained by other testimony, because the law does not consider the writing as the best evidence of the transaction to which it relates. 3rd Phil. on Evidence, 1475, in notes. Now the parol evidence was given, perhaps unnecessarily, to explain why and for what purpose the money was paid by the plaintiff. The declarations were properly received.

The defendant contends, that the agent had no authority to obtain the land upon his own credit, and that making a contract of this kind and paying the money, without request, could not give a right of action; and second, that the plaintiff could not, at any rate, sue without a previous notice of the demand. Neither of the objections can avail the plaintiff, under the facts stated in the case. It is a sound principle, that one man cannot, by paying a debt of another, without his request, make him his own debtor, and thereby entitle himself to an action against him. But that principle has no application here. The plaintiff was not acting officiously, either in binding himself or paying the money. The exception concedes that

the plaintiff was the agent of the defendant. The case shows he was his special agent, to do a particular thing, with unlimited powers, as to the mode and manner of doing it. His instructions were to rent that particular piece of land, at the price of one hundred and twenty dollars, but if he could not get it for that to give Blackwell his price. Such an agency is sometimes called a general agency. Story on Agencies, sec. 18. Were the means used by the defendant unusual, in making such a contract as he did make? Was there anything in the instructions received by him, which forbade the use of such means? The object of the defendant was to rent that piece of land; and the plaintiff was instructed to give the lessor his price. But Blackwell would not take the defendant as his debtor; but insisted that the plaintiff himself should become bound. He did so: and without it the lease would not have been made. Under such circumstances the plaintiff had the right to bind himself to pay the rent. In doing so he only bound himself as far as the defendant, his principal, would, as a lessor, have been bound. The case farther discloses, that the defendant was apprised by the plaintiff of his having rented the land, and the defendant approved of it and directed him not to give it up. If the plaintiff had a *right* in executing this agency to bind himself, then it follows as a necessary consequence, that when he paid the rent, the money was paid to the use of the defendant and he is bound to repay it. Mr. Story, in his treatise on agency, sec. 335, states that an agent has a right to be reimbursed all his advances, expenses, and disbursements made in the course of his agency, on account of and for the benefit of his principal, and which grow out of the employment and are incident to it. The direction to give Blackwell his own price, was an express request to use his own funds or credit, to effect this object; and it does not appear that Irions had any funds of the defendant in his hands. But

whether the authority was express or not, from the nature of the agency it was implied. If the lessor had insisted that the rent should be paid in advance, his instructions would have authorized the plaintiff to pay it; and he should have had a clear right of action against the defendant.

It is further urged by the defendant, that he was a guarantor, and, as such, was entitled to notice of the payment of the money, by the plaintiff, before the action was brought. In the transaction there is no feature of a guaranty. That is a contract, ordinarily, of suretyship. With whom did the defendant in this case form the contract? Not with Blackwell, the lessor, for he knew when he let the land, that the plaintiff was the agent of the defendant, and he expressly refused to trust his responsibility: but insisted on that of the plaintiff. It was upon his credit the contract was made, and to him alone did he look for his rent. With the plaintiff no *such* contract was made or implied, except such as arises in every case, where one man pays money for another, at his request, and in such cases no notice is required of the payment of the money. This is very similar to the case where a bill is accepted for the honor of the drawee and the acceptor pays the money; the law implies a request on the part of the drawee. In the argument, the case of *Grice* v. *Rix*, 3rd Dev., 64, was cited. It has no application. The Court there decide, that where the liability of a party is not *direct* but collateral, and dependent upon the *default* of another, he must be notified of the *default*, before he can be charged. Here the liability of the defendant is direct and not collateral; and the only default was his own, in not paying the rent at the end of the year or furnishing the plaintiff with funds to do so: and this knowledge of the default was, to him, notice sufficient.

A number of depositions, notices and letters were made parts of the case. We must be permitted to suggest, that

this practice is inconvenient and expensive to the parties. So many of the depositions or notices, as may be necessary to present the point to the Court, are required, and no more ought to be incorporated into the case. In this case the clerk has not only sent the originals, but also copies; for what purpose we cannot tell.

PER CURIAM. Judgment affirmed.

CASES AT LAW

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA,

AT MORGANTON.

AUGUST TERM, 1850.

LEWIS CAMP, et al. v. A. R. HOMESLEY.

Where a recovery is had in ejectment, upon the several demises of different persons, all the lessors may unite in a joint action for the mesne profits.

Tenants in common may, in general, sue separately for trespasses on real estate, yet they may also join in such action, in respect to the injury being to their joint possession.

The case of *Holdfast* v. *Shepard*, 9 Ire., 222, cited and approved.

Appeal from the Superior Court of Law of CLEVELAND County, at the Spring Term, 1850, his Honor, Judge *Caldwell*, presiding.

The action is brought by Camp and four others, and is trespass for the mesne profits of a tract of land, recovered in ejectment upon the several demises of the present plaintiffs. Upon the trial on the general issue, it appeared, that

the plaintiffs and the defendant were tenants in common of the premises. The counsel for the defendant thereon insisted, that the plaintiffs could not recover, because a tenant in common cannot have trespass against his companion; and, if that be not so, because the several lessors of the plaintiff in the ejectment cannot join in this action. The court gave instructions to the contrary, and the plaintiff had a verdict and judgment and the defendant appealed.

G. W. Baxter, for the plaintiffs.
Thompson, for the defendant.

RUFFIN, C. J. The directions were right on both points. As the action for mesne profits is substantially a continuation of the ejectment, for the purpose of recovering the actual damages, which were formerly nominally assessed, it follows, that whenever a person is allowed to maintain ejectment, he may have trespass against the same party, by way of completing his remedy. Hence, it is settled, that, after a recovery in ejectment and entry, a tenant in common may sue his companion, who ousted him, for the mesne profits. *Catting* v. *Darby*, 2 Wm. Bl., 1077; *Goodtitle* v. *Tombs*, 3 Wil., 118; *Holdfast* v. *Shepard*, 9 Ire., 222. Then, as to the other point, although it be true, that tenants in common may, in general, sue separately for trespasses on real estate, yet it is established, that they may also join in such action, in respect to the injury being to their joint possession. *Chamier* v. *Clingo*, 5 M. & S., and *Chamier* v. *Slingow*, 2 Chitt. Rep., 410, are direct decisions to that point; and there seems to be no reason, why the case of two or more tenants in common, thus suing their fellow, after recovering in ejectment, should not fall under the common rule.

PER CURIAM. Judgment affirmed.

ALEXANDER FOX v. JOHN B. WOOD.

A *ca. sa.*, issued by a justice of the peace in Buncombe county, ought to be returned to the county court of that county, notwithstanding the provisions of the act of 1844, abolishing jury trials in the county courts of Buncombe.

The case of the *State* v. *Sluder*, 8 Ire., 487, cited and approved.

Appeal from the Superior Court of Law of BUNCOMBE County, at the Fall Term, 1848, his Honor, Judge *Manly*, presiding.

The only question presented is, whether a *ca. sa.*, issued by a justice of the peace in the county of Buncombe, ought to be returned to the county or superior court, under the provisions of the act of 1844, which abolishes jury trials in the county courts of Buncombe and some other counties.

The *ca. sa.* was in the usual form, and, after directing the officer to have the body before some justice of the peace of the said county, to satisfy, &c., concludes thus: "and, in case he shall give bond and security according to law for his appearance before your county court, you are to take the same and make return thereof, with all the proceedings in the case, to said court, and herein fail not."

The officer took a bond for the appearance of the defendant the next term of the superior court, to which court he returned the writ, and the Judge below refused a motion to dismiss, entertained jurisdiction of the case, and the defendant was allowed to appeal.

J. Baxter and *N. W. Woodfin*, for the plaintiff.
Henry and *Gaither*, for the defendant.

RUFFIN, C. J. His Honor was of opinion, that the act of 1844 transferred jurisdiction in such a case directly from the justice of the peace to the superior court.

We do not concur, but believe the proper construction of the act of 1844 only takes to the superior court, in the first instance, such cases as will require the intervention of a jury as a matter of course. A statute, making an exception to the general law, should be confined to the object which was in view, and the necessity which gave rise to it. The statute under consideration provides, among other things, that *all* appeals from a justice of the peace in the counties of Buncombe, &c., in civil cases, shall be returned to the next term of the superior court. This is not an appeal, and does not come within the words, nor does it come within the necessity, of the statute: for it may be, that an issue of fraud will not not be made up. In appeals, the issue is made and tried by the magistrate, and a jury will be required in the court, to which it is carried, as a matter of course, unless one party or the other makes default.

Proceedings in bastardy are returnable to the county court, and if an issue is made up, it is taken to the superior court by *certiorari*. *State* v. *Studer*, 8 Ire., 487.

The same principle governs this case. The judgment below ought to be reversed and the motion to dismiss allowed.

This opinion will be certified to the court below.

PER CURIAM. Ordered accordingly.

MICHAEL FRANCIS v. WILLIAM WELCH.

A negro slave was permitted by his master to own a horse. Afterwards the negro was sold to A., and the horse was taken to the latter's house. A. directed the negro to take the horse away, and he was accordingly given to the negro's son, who was the slave of B. B. set up no claim to the horse and his slave sold him to another person; *Held*, that A. could support no action against B. for the value of the horse.

An executor *de son tort* is entitled to no action.

One cannot be held liable as executor *de son tort*, where there is a rightful executor, except in cases alleged to be fraudulent.

Appeal from the Superior Court of Law of HAYWOOD County, at the Spring Term, 1850, his Honor, Judge *Caldwell*, presiding.

This is trover for a horse, tried on not guilty pleaded. The evidence was, that one Love owned a slave, and permitted him to purchase a horse and use him as his own. After the death of Love, his executors delivered the slave to one Prather, to whom he had been bequeathed by Love, and Prather sold and delivered him to the present plaintiff. When the slave went to the plaintiff's, he took the horse with him; but, after some time, the plaintiff objected to having the horse kept there, and the slave then put him into the possession of his son, who belonged to the defendant, and kept the horse on the defendant's plantation as his own—the defendant not assuming any control over the horse. Afterwards—how long did not appear—the plaintiff borrowed the horse from the defendant's negro to drive to an adjoining county, and, on his return, he locked him up in his stable for the night. The next morning the horse was gone, and afterwards he was seen in the possession and use of the defendant's slave on his plantation for a few days, and until, in the absence of the

defendant from home and without his knowledge, as far as appeared, the said slave sold the horse. The plaintiff, in some short time afterwards, demanded the horse from the defendant, and then brought this suit.

The plaintiff, thereupon, insisted that he was entitled to a special property in the horse, as the bailee of Love's executors, the owners; and, further, that, if not so entitled, he had a right to the horse as the executor *de son tort* of Love, responsible over to the lawful executors. But the court refused so to instruct the jury, and the plaintiff submitted to a nonsuit and appealed.

N. W. Woodfin and *J. Baxter*, for the plaintiff.
Gaither, for the defendant.

RUFFIN, C. J. There is no ground whatever for the action. If the property were in the plaintiff, there is no evidence of a conversion by the defendant, who, when the plaintiff would not let the horse stay at his house, merely allowed his negro to keep him and set up no claim to him. Property, got by a slave, may, for his want of capacity, vest in the master; but, certainly, a slave cannot, by conversion, divest the property from the owner and vest it in his master, so as to render the latter liable for conversion. But the plaintiff had, in truth, neither a general nor a special property in the house. According to his own position the property was in Love's executors, and from them it never passed, as far as is seen; at all events, not to the plaintiff, who purchased the negro only and not the horse. As to his being executor of his own wrong, the answer is, that the law holds such an executor to many liabilities, but gives him no action; and, moreover, that one cannot be held liable as executor *de son tort*, where there is a rightful executor, except in cases alleged to be fraudulent.

PER CURIAM. Judgment affirmed.

E. G. MORROW v. J. B. ALLISON.

Where a *scire facias* has been sued out upon a judgment, and, while it is in the sheriff's hands, the parties agreed that the collection of the money should be suspended, so as to enable them to make a full settlement, yet the sheriff is not thereby excused from returning the process, but is liable to an amercement, if he fails to do so.

Appeal from the Superior Court of Law of HAYWOOD County, at the Spring Term, 1850, his Honor, Judge *Caldwell*, presiding.

This is a *scire facias* on an amercement *nisi* of $100, for not making return of a writ of *scire facias*, sued out upon a judgment recovered by the plaintiff against one Smith and one Rhinehardt, and delivered to the defendant, then the sheriff of Haywood. The defendant pleaded *nul tiel record* of the order *nisi;* which was adjudged against him. He also pleaded specially, that the plaintiff directed the defendant not to return the said writ. On the trial, evidence was given on the part of the defendant, that, while the sheriff had the writ in his hands and before the day for the return thereof, an agreement was entered into, between the plaintiff and the defendant in the execution, to suspend the collection of the money mentioned in the writ, with a view to a settlement between them in relation to it and other dealings between them. The court directed the jury, that, if the parties made such agreement to suspend the collection before the return day of the execution, the defendant was not liable to be amerced, at the instance of the plaintiff, for not returning the execution. The jury found for the defendant and he had judgment, and the plaintiff appealed.

J. Baxter, for the plaintiff.

N. W. Woodfin, *Henry* and *G. W. Baxter*, for the defendant.

RUFFIN, C. J. If this were a rule for an attachment, on which the Court could hear affidavits to purge the contempt, probably a case might be made for discharging the officer. But it is not a proceeding of that sort; and, on the contrary, it is for a penalty, expressly given by statute, to the party grieved, against a sheriff, who neglects to make due return of process, delivered to him twenty days before the court, to which it is returnable. The plaintiff in the execution is, therefore, legally entitled to an amercement against the officer, who fails in that duty, unless he be discharged by the party from its performance. Though pleaded, there is here no discharge in point of fact. An agreement to suspend the collection of the debt, or to stay the execution, as it is commonly called, even if communicated to the sheriff, gives no authority to the officer not to return the writ. The return may be material to the creditor in several ways; as to enable him the earlier or the more readily to sue out another writ, or to rebut the presumption of satisfaction, or the like. Certainly, a direction not to enforce the immediate payment of the debt in the execution is not a direction, nor even an allowance, that the sheriff should not return the writ. The jury, therefore, was not sustained by the evidence and ought not to have found for the defendant, and the judgment must be reversed and a *venire de novo* awarded.

PER CURIAM. Judgment accordingly.

WILLIAM PARHAM v. JOSEPH HARDIN.

Where a suit is commenced in the superior court for a less sum than sixty dollars for goods, &c., sold, or for a less sum than one hundred due by note, &c., the suit shall be dismissed; and if the party demands more in his writ for the purpose of evading the law, and the jury finds that a less sum is due to him than that of which the court has jurisdiction, he shall be nonsuited: provided that if the party will make affidavit that the sum, for which he has sued is really due, but he cannot establish it for want of proof, or that the time limited for the recovery of any article bars a recovery, then the plaintiff shall have judgment, &c.;

Held, that the same rules apply to suits in the superior court of Cleveland county, removed, under the private acts of 1844 and 1846, from the county to the superior court of that county.

The case of *Clark* v. *Cameron*, 4 Ired., 161, cited and approved.

Appeal from the Superior Court of Law of CLEVELAND County, at the Spring Term, 1850, his Honor, Judge *Caldwell*, presiding.

J. G. Bynum, for the plaintiff.
J. Baxter and *G. W. Baxter*, for the defendant.

NASH, J. The action was commenced in the superior court of Cleveland county. The declaration was in *indebitatus assumpsit* for one hundred dollars. On the trial, the plaintiff proved an account for sixty-one dollars, which was reduced by a payment to forty-one dollars, for which sum the jury rendered a verdict. The court, on motion of the defendant, set aside the verdict and nonsuited the plaintiff, because the court had not jurisdiction.

By the 40th sec. of the act of 1836, it is enacted, "that no suit shall be orginally commenced in any court of record for any debt or demand of less value than sixty dollars, for goods, wares and merchandise," &c., "nor for any sum of less value than one hundred dollars due by

bond, note," &c. By the 41st sec. it is provided, "if any suit shall be commenced in any of the said county courts for any sum of less value than sixty dollars, contrary to the provision of the preceding section, the same shall be abated on the plea of the defendant," &c. The 42nd sec. directs, that "if any suit shall be commenced in any of the superior courts, contrary to the provisions of the 40th sec., the same shall be dismissed by the court, and if any suit shall be commenced in any of the superior courts contrary to the true intent and meaning thereof, or if any person shall demand a greater sum than is due, on purpose to evade the operation of this act or otherwise, and by the verdict of a jury, it shall be ascertained, that a less sum is due to him in principal and interest, than by the provision of the said 40th sec, the said court has jurisdiction of, then and in that case, it shall be the duty of the court to nonsuit the plaintiff: and he shall pay all costs: provided, that if the plaintiff will make an affidavit to be filed in the case, that the sum, for which the suit is brought, is really due, but that, for the want of proof or that the time limited for the recovery of any article bars a recovery, then the plaintiff shall have judgment," &c.

The result from these different sections is, that if a suit be *commenced* in the county court, for a sum of less value than sixty dollars, it shall be abated upon the defendant's plea. He cannot, if he plead in chief, avail himself of the prohibition by a motion to dismiss. If the suit be in the superior court, and be commenced for, that is, "if the writ demand, a less sum than pointed out in the 40th sec., the court shall dismiss it." *Clark* v. *Cameron*, 4th Ire., 161. The object of the legislature, however, might be evaded in the latter case, by demanding in the writ a sum which would give the court jurisdiction, when, really, a less sum was due. In such case, the court cannot dismiss the suit. It cannot judicially

know the fact to be that it had not jurisdiction: but that difficulty is met in the 42nd sec. If the suit shall be commenced contrary to the provisions of the 40th sec., or if a greater sum is demanded in the writ than is due, with the intent to evade it, and the verdict of the jury shall be for a sum less than that which gives jurisdiction to the court, the plaintiff shall be nonsuited and pay the costs; and the legislature considers the finding of a less sum by the jury as proof of the *intent* of the plaintiff, in demanding a larger sum than is found due. And such has been the practice under the act as far as we are informed. But it is not conclusive upon the party—for he may, under the first proviso, show, that the sum really due is such as to give jurisdiction to the court. The plaintiff, however, contends that, as he could have brought his action in the county court by the general law, and as jury trials in that tribunal are abolished in Cleveland county and transferred to the superior court, by a just construction of the local acts, advantage must be taken of the want of jurisdiction, as is pointed out in the 41st sec., and that the provisions of the 42nd sec. do not apply to such a case. We do not concur in this view of the law. By the local act of 1846, ch. 150, the trial by jury is abolished in the county court of Cleveland, and it is declared, that an act passed in 1844, giving to the superior courts of the counties of Yancey and others original and exclusive jurisdiction in all cases, where the intervention of a jury may be necessary, shall extend to the county of Cleveland. By the 5th sec. of the act of 1844, *all* suits are directed to be brought in the superior courts of the counties embraced in the act. By the local act of 1846, the 41st sec. of the general law, so far as the county of Cleveland is concerned, is repealed. The jurisdiction of the county and superior courts is not concurrent in all suits upon money demands. The private

act of 1846 did not increase the jurisdiction which the superior court of Cleveland would have had under the general law; its only effect, in this particular, was to increase its business, by throwing into it original suits, which might have been brought in the county court; nor does it disturb the provisions of the 42nd sec. of the general law. As to the proceedings of the superior courts, they remain as they were under the act of 1836. By this latter act, the finding of the jury ascertains the sum actually due to the plaintiff, and also the intent with which a larger sum was demanded in the writ, "to-wit," to evade the act; and but for the proviso, it would have been conclusive upon the plaintiff, and the court would have been imperatively bound to nonsuit him, *non obstante veredicto.* But the proviso put it in his power to avoid the conclusion, if the facts will justify him in making the required affidavit. This has not been done—and the court committed no error in the judgment pronounced.

PER CURIAM. Judgment affirmed.

JOSEPH BROWN v. JAMES RAY, Sen.

Where A. contracted to deliver to B. a certain quantity of corn, if called for by a particular day, and B. did not call for it till some time afterwards, *Held*, that B. was not entitled to recover in *assumpsit* on the contract.

Appeal from the Superior Court of Law of YANCEY County, at a Special Term in July, 1850, his Honor, Judge *Battle*, presiding.

N. W. Woodfin, for the plaintiff.

J. W. Woodfin, for the defendant.

NASH, J. The plaintiff declared in assumpsit, for the non-delivery of a quantity of corn. The case was—the defendant being much indebted, several of his creditors obtained judgment against him, the executions upon which were levied on the corn in question, which was sold in parcels, and the plaintiff became a purchaser of three of the lots. After the sale had closed, the officer observed to the parties that he could not, at that time, measure out to the purchasers their respective quantities, and proposed to the defendant, that he should do it. He agreed to do so. One witness stated his agreement to be, that he would deliver it, whenever they would call for it. Another witness stated the agreement to be, that he would deliver the corn, if the purchasers would call for it in a week or ten days. The sale and the agreement were made on the 26th March, 1846, and the demand for it in June or July following. His Honor instructed the jury, if the promise by the defendant to deliver the corn was, as stated by the first witness, the plaintiff was entitled to recover; but if it was, as stated by the second witness, he was not, because in that case, the defendant's promise to deliver did not extend beyond the time specified, and the subsequent refusal in June or July, did not vary the case. The jury found for the defendant, and from the judgment the plaintiff appealed.

We entirely concur with his Honor in the opinion given by him, and for the reason expressed. There being contradictory evidence as to the terms of the contract, it was a proper subject of enquiry to be made by the jury, what was the true and correct agreement? They found that the defendant had agreed to deliver the corn, if called for

in a week or ten days. This being the contract, the plaintiff, to avail himself of it, in this form of action, ought to have demanded the corn within the time specified—that is on or before the first of April, '46—as the days would then have expired. The action is on the contract and not for the conversion. The demand and refusal to deliver being made in June, might have entitled the plaintiff to damages in another form of action, but not in this.

PER CURIAM. Judgment affirmed.

HENRY E. LYNCH v. WILLIAM T. JOHNSON.

The jury cannot allow commissions to an executor, &c., without a previous order of the county court; but it is not necessary that this order should be made before the commencement of the suit against the executor.

The Act of 1826, Rev. Stat., ch, 31, sec. 119, authorizing references to be made in courts of law to state the accounts of administrators, executors and guardians, applies only to suits brought upon their bonds respectively. It does not apply to suits, brought upon bonds given by a testator or intestate, in which fully administered is pleaded.

Appeal from the Superior Court of Law of HENDERSON County, at the Fall Term, 1849, his Honor, Judge *Ellis*, presiding.

This is an action of debt on a bond given by the intestate. Plea, *plene administravit.* By an agreement between the parties, it was referred to the clerk to inquire into the assets and state an account thereof, shewing the balance. The report gave the defendant credit for $181, as commissions allowed him by the county court pending the enquiry; and the plaintiff excepted thereto on the

ground that the court had no power, after this suit brought, to make the order so as to affect these parties. The report also gave the defendant credit for several sums paid, before this suit brought, to persons, who had paid bonds given by the intestate and themselves as his sureties; and the plaintiff excepted also to them upon the ground that they were simple contract debts. The plaintiff brought on his exceptions to be argued and the court overruled them; but the plaintiff was allowed to appeal.

No counsel for the plaintiff.

J. Baxter and *N. W. Woodfin*, for the defendant.

RUFFIN, C. J. The points made by the exceptions are very plain and were correctly decided. A jury cannot allow commissions, without a previous order of the court, before which the administrator was to account. *Hodge* v. *Armstrong*, 3 Dev., 253. If the exception were well founded, the consequence would be, that a creditor could always defeat the party of his commission by bringing his suit soon after administration granted, and before the estate was in a condition to admit of a return of an account and a motion for commissions. In such cases, the allowance is necessarily made, pending the action.

The act of 1829 changed the rule of the common law on the second point, as it gives to the claim of the surety, paying a debt of the principal, the same priority against the assets, which belonged to the creditor.

If the case, then, depended on those points alone, the judgment would be affirmed. But it cannot be done, as the Court is of opinion it was erroneous to take cognizance of the report and exceptions. The parties seem to have proceeded on the notion, that the act of 1826, Rev. St. ch. 31, sec. 119, embraced cases like this. But that is a mistake, as that act has only suits brought on the bonds of executors, administrators and guardians in its purview,

and it leaves the trial of the issue upon *plene administravit* to the jury and upon the evidence required at the common law. It is not uncommon, it is said, for parties to make references of this kind. If so, it is a matter of consent, for convenience sake, so as to reduce the points to be disputed, to as few as possible, and thus save the delay and expense incident to proving the whole administration account on the trial.

As to the matters disputed, however, the Court cannot act judicially on exceptions to the report, as in equity, or in the cases within the act of 1826, but only by giving instructions on them, as in other cases, when asked upon the trial before the jury. Therefore, although the opinions given in the superior court were, in themselves, right, it was wrong to give them at all; and for that reason, it must be certified to that court, that the decision ought to be reversed. But as the error, for which the reversal is directed, was caused by the plaintiff, who is the appellant to this court, he cannot have his costs, but must pay those of the defendant, as was done in the similar case of *Hicks* v. *Gilliam*, 4 Dev., 217.

PER CURIAM. Ordered accordingly.

JONATHAN FORD v. LEWIS VANDYKE.

In charging a guardian, the mode of compounding interest is to make annual rests, making the aggregate of the principal and interest, due at the end of a particular year, a capital sum bearing six per cent. interest thenceforward for another year, and so on, with rests from year to year. But if a sum be found due at a rest day during the guardianship, that sum, being then converted into capital, is entitled to draw interest thereafter until it shall be paid, and that is but simple interest, there being no subsequent rest made.

Where an assignee of a bond brings an action of debt upon the bond, and the defendant pleads *non est factum* only, this plea does not deny the assignment. But, if the action be on the case, as given by our statute to the assignee of a bond, the general issue denies both the execution of the bond and the endorsement.

Appeal from the Superior Court of Law of MACON County, at the Fall Term, 1849, his Honor, Judge *Ellis*, presiding.

The declaration is in debt on a bond for $170.12, alleged to be executed by the defendant to George R. Ledford, indorsed to Javan Trammell and by him to the plaintiff. Pleas, *non est factum*, payment, and the statute against usury. The bond produced on the trial was for $262.56, with sundry payments credited on it. After proving its execution, the plaintiff offered it in evidence, and the defendants objected to it for the variance between it and that declared on; but the court received it. On it were the two endorsements stated in the declaration, but that to the plaintiff purported to be made in the name of Javan Trammell "by his agent, Newell Trammell." The plaintiff then produced a witness, who stated, that he was with said Javan and Newell at their residence in Georgia, before the endorsement to the plaintiff, and the

former said, that he was too unwell to visit North Carolina, and he intended to send Newell to do some business for him, and that, on the same occasion, Newell stated to the witness, that he was going to North Carolina to collect a bond on Lewis Vandyke; but the witness could not tell, whether Javan heard that or not. Upon that evidence and after objection from the defendants, the endorsements were read to the jury. The defendants then gave evidence, that the defendant Vandyke had been the guardian of the obligee, Ledford, and that about three months after Ledford came of full age, he and Vandyke met for the purpose of making a settlement, and that, between themselves, they ascertained the principal sums received, the disbursements made by the guardian for the ward, and that, then, they referred it to three persons to make the proper calculations of interest, so as to compute the sum then due to Ledford, and that, in doing so, those persons calculated compound interest up to the day of the settlement, and thereby made the balance of principal and interest amount to the sum of $262.56 for which the bond was given.

The counsel for the defendant insisted, that the bond was usurious, and also, that Newell Trammell had no power to make the endorsement to the plaintiff. But the court instructed the jury, that the transaction between Ledford and Vandyke was not usurious; and that, if they believed Newell Trammell had in fact been authorized by said Javan to endorse the bond in his name, they ought to find for the plaintiff, after deducting the payments proved. The jury found the payments, and then a balance of principal money of $172.69, due on the bond, and assessed damages for interest since the last payment, and also found for the plaintiff on the plea of usury, and after judgment the defendant appealed.

J. W. Woodfin, for the plaintiff.
J. Baxter, for the defendant.

RUFFIN, C. J. The instructions were right upon the question of usury. The point, as to the amount of interest, was referred to arbitrators, and there is nothing to shew, that their determination was not the honest result of their judgment, without collusion with the view of giving color to an arrangement of the parties in evasion of the statute. The award, thus fairly made, judicially established the interest legally due, and one of the parties can no more unravel the award in order to open the question, than he could, for that purpose, go behind a judgment or decree of a court of justice. Besides, the decision of the arbitrators was perfectly correct. It is true, that interest on a debt from a guardian, is not compounded after the ward comes of age. But, that was not done here. The mode of compounding the interest in such cases, is to make annual rests, making the aggregate of principal and interest, due at the end of a particular year, a capital sum bearing six per cent. interest, thenceforward for another year, and so on with rests from year to year.

But if a sum be found due at a rest day during the guardianship, that sum, being then converted into capital, is entitled to draw interest thereafter until it shall be paid, and that is but simple interest, there being no subsequent rest made. That was this case; for the settlement was made within three months after the ward came of age, and, as the Court understands the statement, 6 per cent. interest merely was computed on the balance due at the preceding annual rest, during the infancy, from that day up to that of the settlement, on which the bond was given. That was legal, for as no rest was made after the full age of the ward, it is manifest he only got simple interest on the sum the law made principal during his minority. The other part of the instructions, if erroneous, was

immaterial; since the endorsement from Trammell was not in issue on the record. If the plaintiff had brought the action on the case, given by the statute to the assignee of a bond, proof of the endorsement as well as of the bond would have been received on the general issue; because, that goes to every fact entering into the right of the plaintiff and the obligation of the defendant to him. But in debt on a bond, the plea *non est factum*, is, in terms, restricted to the point, that the supposed bond is not the defendant's deed; consequently, a special plea was necessary to put the endorsements in issue. But it was clearly erroneous to receive in evidence a bond for $262.56, under a declaration on one for $170.12, upon *non est factum* pleaded. The description of a deed in the declaration must be sustained by the proof; otherwise the pleadings do not identify the cause of action, and there would be no means, by which the defendant could avail himself, in another suit, of a judgment for or against him in this.

PER CURIAM. Judgment reversed and *venire de novo*.

CHARLES COGLE v. ALEXANDER HAMILTON.

A. being a surety for B., to indemnify him, B. gave him a lien on some hogs. B. afterwards sold the hogs to C. A. refused to deliver the hogs, unless C. would agree to pay the debt for which A. was bound. This C. promised, but failed to make the payment, and A. had to pay the debt himself. He then warranted C. for the money so paid; *Held*, that a justice of the peace had no jurisdiction of the case.

Appeal from the Superior Court of Law of HENDERSON County, at the Fall Term, 1849, his Honor, Judge *Ellis*, presiding.

N. W. Woodfin, for the plaintiff.
J. Baxter, for the defendant.

PEARSON, J. One Deaver held a note on one Richardson for fifty dollars, with the plaintiff as surety. Richardson gave the plaintiff a lien on a parcel of hogs to indemnify him. Afterwards Richardson sold the hogs to the defendant: but the plaintiff refused to let him have possession, until he would undertake to pay the debt. Accordingly the defendant agreed to pay it, and the plaintiff thereupon agreed that he might take the hogs. The defendant took the hogs, but neglected to pay the debt to Deaver, except $19, which was paid by Richardson. The plaintiff thereupon warranted the defendant, to recover the amount which he had paid Deaver. The defendant insisted, that a single justice of the peace had no jurisdiction. The judge in the court below was of opinion, that the case was within the jurisdiction of a single justice of the peace, and so instructed the jury, who found a verdict for the plaintiff, and from the judgment the defendant appealed.

We think the exception is well founded. The defendant had agreed, for a sufficient consideration, to pay the debt to Deaver. This was a collateral act, and the neglect to perform it gave the plaintiff a good cause of action. But it was not a "debt or demand," within the meaning of the statute, conferring jurisdiction on a single justice of the peace. It was like a promise to go to Rome or to do any other act.

The plaintiff resorted to the common counts in assumpsit to sustain his case; but none of them will fit, supposing him to be at liberty to abandon the special contract. The count "for money paid" cannot be sustained, because there was no privity of contract between the defendant and Deaver. If there had been a contract between them, by which the defendant assumed to pay to him the debt of the plaintiff, it was void by the statute of frauds. So the money was not paid for the defendant's use.

The count, "for goods sold and delivered," does not apply, for the hogs were sold by Richardson, and the plaintiff merely gave up his lien, in consideration of the defendant's undertaking to pay the debt to Deaver. The price, over and above this undertaking, was due to Richardson; or, at most, it was a sale by Richardson and the plaintiff, in which case the action for the price must be by the plaintiff and Richardson jointly, for although, under the special contract, each had a separate cause of action, under the implied contract, for the value of the hogs, the action would be joint.

The judgment must be reversed and a *venire de novo* awarded.

PER CURIAM. Judgment accordingly.

BYNUM W. BELL v. WILLIAM W. PEARCY.

The verdict of a petit jury, acquitting a man indicted for a conspiracy, does not, in an action for malicious prosecution, support the averment, that the indictment was without probable cause.

The case of *Griffis* v. *Sellars*, 4 Dev. & Bat.. 176, cited and approved.

Appeal from the Superior Court of Law of McDOWELL County, at the Fall Term, 1849, his Honor, Judge *Ellis*, presiding.

J. W. Woodfin and *J. G. Bynum*, for the plaintiff.
N. W. Woodfin and *J. Baxter*, for the defendant.

PEARSON, J. This was an action for a malicious prosecution. The plaintiff read in evidence a record, shewing that an indictment against him for a conspiracy had been found by the grand jury "a true bill," and that he had been tried and acquitted. The defendant admitted, that the proceeding had been instituted at his instance. There was no other evidence. The plaintiff moved the court to charge, that his acquittal supported the averment of "a probable cause." The court refused, and for this the plaintiff excepts.

Malice and a want of probable cause is the gist of the action. This averment is made by the plaintiff, and it is for him to prove it. He relies solely on the fact, that the jury have acquitted him. This has no tendency to shew a want of probable cause. The jury say, the evidence was not strong enough to convict. What has the force of the evidence, how near it approached to conviction, whether the plaintiff was acquitted by having the benefit of a reasonable doubt, are matters, about which the verdict is of course silent. The grand jury find there was probable

cause—the petit jury find that there was not sufficient to convict. *Non constat*, that there was no probable cause. The question is too plain to admit of argument.

In *Griffis* v. *Sellars*, 4 Dev. and Bat., 176, it is held, that if one be convicted in the county court, and, upon appeal, is acquitted in the superior court, still the fact of his having been convicted is *conclusive* evidence of probable cause, and his subsequent acquittal does not open the question.

The finding of a grand jury has not this conclusive effect, and an acquittal opens the question, so as to give the party an opportunity to offer evidence to repel the presumption, growing out of the action of the grand jury. How the acquittal can have any further effect, we are at a loss to conceive.

PER CURIAM. Judgment affirmed.

THE STATE on the relation of WAUGH & HARPER v. ELISHA P. MILLER, et al.

Where money has been paid into a clerk's office upon a judgment, and the judgment is assigned for the attorney's receipt for the note on which the judgment was obtained has been transferred, by the plaintiff in the judgment to a third person, such assignee has no right to sue the clerk for the money in his own name, as he had but an equitable interest.

The cases of *Jones* v. *Blackledge*, 2 Car. Law Rep., 457, and *Arrington* v. *Horn*, 2 Car. Law Rep., 631, cited and approved.

Appeal from the Superior Court of Law of CALDWELL County, at the Spring Term, 1850, his Honor, Judge *Caldwell*, presiding.

J. G. Bynum, for the plaintiffs.
Gaither and *T. R. Caldwell*, for the defendant.

NASH, J. We agree with his Honor that the action cannot be sustained. The facts are as follows: Lyle and Clayton placed in the hands of an attorney certain notes for collection. Suits were brought, moneys made and the moneys paid into the office of the clerk of the court. During the pendency of the action, the receipt given by the attorney, on receiving the notes, was, by the plaintiff, transferred to the relators for a full consideration. A part of the money was paid by the defendant, the clerk, to the present relators. Another judgment had been obtained by one Moody in the same court and the money also paid into the office of the clerk. The relators had purchased certain witness tickets, which were filed in the case, the amount of which, included in the costs, was also paid in. The action is upon the official bond of the defendant, as clerk of the court, and the breach assigned

the non-payment of the money so paid into the office. The refusal of the defendant to pay the money to the plaintiffs is no breach of the bond. Every clerk is required faithfully to pay over all moneys, received into his office, to the person or persons entitled to receive the same. The inquiry then is, who was entitled, under the law, to demand from the defendant the money claimed in this suit. Clearly not the relators. A judgment, it has been decided, is not assignable: and the transfer of the attorney's receipt for the notes, could, at best, transfer but an equitable right to the money, when collected. The judgment still remained, in law, the property of the plaintiffs at law. These were Lyle and Clayton, and they, or their attorney at law, or their attorney in fact, were alone legally entitled to demand and receive the money from the defendant. The case is in a court of law, where, in general, only legal interests are regarded. *Jones and Wife* v. *Blackledge*, 2 Car. L. Rep., 457; *Arrington* v. *Horn*, 2 Car. L. Rep., 631. The defendant was under no legal obligation to pay the money to the relators, and his refusal to do so was no breach of his bond, for which they can sue.

PER CURIAM. Judgment affirmed.

ANDREW J. PATTON v. JOHN R. DYKE, et al.

In an action, in which is involved the *bona fides* of a contract for the sale of goods, the declaration of the vendors, at the time of the sale, that they were indebted to the vendee, and an agreement between the parties that the price of the goods or a part of it was to be credited on that debt, is competent evidence, though the action is against third persons for seizing and converting the goods.

So, also, the declaration of the vendors, made some time before the contract, to another person besides the vendee, that they were indebted to the vendee, is competent evidence to prove such indebtedness in an action by the vendee against third persons.

The case of *Askew* v. *Reynolds*, 1 Dev. & Bat., 370, cited and approved.

Appeal from the Superior Court of Law of MACON County, at the Spring Term, 1850, his Honor, Judge *Ellis*, presiding.

J. Baxter, for the plaintiff.
N. W. Woodfin and *J. W. Woodfin*, for the defendants.

NASH, J. The plaintiff complains, that the defendants took and converted to their use a quantity of goods, which were his property. The case is as follows: Colbert & Morris, merchants in trade, were the owners of the goods and sold them to the plaintiff for the sum of four hundred and fifty dollars, which was an advance of twenty per cent. on what they cost—a part of the purchase money was paid at the time of sale. A witness by the name of Morris, stated that he was present at the sale, as agent of his son, who was one of the owners of the goods—and that it was agreed between the parties, that, after deducting the cash payment, the balance should be credited by the plaintiff on a debt due him by the firm, for money advanced by him to them in Charleston, South Carolina,

to pay debts due by the firm, for which they were there arrested. He further stated, that he had, before that time, heard both the members of the firm say, they owed the plaintiff for money advanced by him for them on that occasion, and the debt was spoken of by the parties at the time of the sale. All this testimony was objected to by the defendants. The defendants were officers of the county of Macon, confessed the conversion of the goods, and justified under several executions, some of which were issued by magistrates to collect debts due by the firm, and some issuing from court, against Colbert, one of the firm, for debts due by him individually. The firm of Colbert & Morris was in failing circumstances, at the time the sale was made to the plaintiff. On the part of the defendants, it was contended, that the sale to the plaintiff was fraudulent, as to all the creditors, not being for a valuable consideration and *bona fide*. The court instructed the jury, that the executions created no such lien upon the goods, as prevented the sale to the plaintiff, and that the question of fraud was one for their decision —and if they believed the sale to the plaintiff was *bona fide* and for a valuable consideration, going to pay a debt due by the firm, they should find for the plaintiff, otherwise for the defendants. The jury found a verdict for the plaintiff. We concur with his Honor in the instructions given. The executions in the hands of the officers formed no justification, unless the sale to the plaintiff was fraudulent. If it was so, it was void, as to the creditors of Colbert & Morris, and left the goods liable to these executions. Two questions are presented by the record: the one is the *bona fides* of the sale, and the other is, the admissibility of the declaration of the parties at the time of the sale and before, as to the indebtedness of the firm to the plaintiff. His Honor committed no error, in admit-

ting the declaration of the parties at the time of the sale; it was a part of the transaction. The plaintiff paid a part of the purchase money, at the time of the contract, and the disposition of the remainder was a necessary enquiry, as constituting a part of the agreement. Was it to be paid then, or was the purchaser to have a credit for it; if so, how long and what assurance was he to give? his bond or his note, or the bond or note of a third person? or was it to be paid in specified articles, or how else was it to be discharged? All these might have been the subject of arrangement, and which one of them might have been selected, would have constituted a part of the contract of sale—and while it remained in parol, might be proved by evidence of what was spoken and agreed by the parties at the time. It *was* then competent for the plaintiff to prove, how and in what manner, he was to pay the balance of the price of the goods, and the agreement was, that the vendors were to be credited for it on a debt due by them to him for money, before that time, paid by him in the city of Charleston, to prevent them from an arrest for a debt due by the firm. The partners, at the same time, acknowledged their indebtedness and stated how it had been incurred. The plaintiff was entitled to the whole of what was said by the parties in making the contract. See the reasoning of the Court in the case of *Askew* v. *Reynolds*, 1 Dev. & Bat., 370. The declarations of the parties, made before the time of the sale, admitting their indebtedness to the plaintiff, being made *ante litem* and before any movement was made, or, as far as the case discloses, was thought of, towards the sale of the goods to the plaintiff, in a question impeaching the fairness of that transaction, was, certainly evidence of the fact, it being against their interest at the time it was made. If these declarations were competent evidence and the facts disclosed by them were

believed by the jury to be true, then the only remaining question is answered. The sale was made *bona fide*, and there was a valuable consideration for the contract.

PER CURIAM. Judgment affirmed.

PHILIP HARSHAW v. WILLIAM CROW.

The preamble to a warrant constitutes a part of it, and where it sets out, in apt words, the offence, for which, as the plaintiff alleged, the defendant had incurred the penalty sued for, the form is a proper one.

Appeal from the Superior Court of Law of CHEROKEE County, at the Spring Term, 1850, his Honor, Judge *Ellis*, presiding.

This was a suit by warrant for $50, the penalty for burning the plaintiff's woods. The warrant was as follows:

STATE OF NORTH CAROLINA, }
CHEROKEE COUNTY. }

To any lawful officer to execute and return:

Whereas, Philip P. Harshaw complains to me, William Manchester, a justice of the peace of said county, that William Crow, on the —— day of April last past did set fire to a certain piece of woods of complainant and adjoining the woodlands of the complainant and others, without previously giving two days' notice to the owners of said adjoining woodlands, contrary to the act of assembly in such case made and provided, whereby he has

forfeited the sum of fifty dollars for the said offence :— This is therefore to command you to take the body of the said William Crow and him have before me or some other justice of the said county to answer the premises and render to the said Harshaw the said sum of fifty dollars, which he owes and unjustly detains. Herein fail not. Given under my hand and seal this 21st of November, 1849.

Signed, WM. MANCHESTER, [SEAL.]

The warrant was tried before a magistrate and came up by successive appeals to the superior court. The jury there found a verdict for the plaintiff, and the defendant moved in arrest of judgment, and, being sustained in his motion, the plaintiff appealed.

No counsel for the plaintiff.
J. W. Woodfin, for the defendant.

PEARSON, J. This was a warrant for $50, the penalty for burning the plaintiff's woods. The jury found in favor of the plaintiff, but the judge below arrested the judgment, being of opinion, that "the preamble constituted no part of the warrant." In this, we think there was error. The recital or preamble, as it is called, does constitute a part of the warrant and sets out, in apt words, the offence, for which, as the plaintiff alleged, the defendant had incurred the penalty sued for.

The warrant is a very good form. We can see but one objection to it, as applied to this case; and that is, the negative averment as to two notice day's not having been given to the owners of adjoining woodland. The defendant set fire to the plaintiff's woodland, and in such case he incurred the penalty, without reference to the fact of notice. The provision only applies to cases, where one sets fire to *his own woodland*. This averment, however,

is mere surplusage, and has no effect upon the validity of the warrant.

The judgment must be reversed, and there must be judgment for the plaintiff.

PER CURIAM. Judgment accordingly.

THE STATE v. FRANCIS B. WORLEY.

A seal is essential to a warrant, issued by a magistrate to arrest a person for a criminal offence, and, if there be no seal, the warrant is void, and the defendant is justified in resisting its execution.

Whether there be a seal or not is a mixed question of law and fact, to be decided by the judge below, and from his decision there is no appeal to this Court.

The cases of *Welch* v. *Scott*, 5 Ired., 72, and *State* v. *Isham*, 3 Hawks, 185, cited and approved.

Appeal from the Superior Court of Law of CLEVELAND County, at the Spring Term, 1850, his Honor, Judge *Caldwell*, presiding.

Attorney General, for the State.
Henry, for the defendant.

NASH, J. The defendant was indicted for an assault and battery upon an officer. A search warrant was issued by a justice of the peace, upon due information made to him, commanding the officer "to search the premises of the defendant" (for certain stolen property) "and, if found there, to bring it and the defendant before the magistrate, granting the warrant, or some other justice of the

peace of the county, to be dealt with according to law. Given under my hand and seal this 30th September, 1849.

JAS. SHARP," [J. P.]

This warrant was placed in the hands of the prosecutor, who was an officer of the county, and, in endeavoring to execute it, the assault was made. For the defendant it was insisted, that the warrant was void for want of a seal and for other defects apparent upon its face. The court was of opinion that it had a seal attached, and that it was otherwise sufficient in law to justify the officer in arresting the defendant. The jury found the defendant guilty, and from the judgment on the verdict the defendant appealed.

It is certain, a seal is essential to every warrant, issued by a magistrate to arrest any person upon a criminal charge. If there be no seal, the precept is void and affords no protection to the officer attempting to execute it; and, if its execution is resisted by the defendant, he is guilty of no offence against the law, though, in doing so, the person of the officer be assaulted. *Welch* v. *Scott*, 5 Ired., 72. The question, whether there be a seal or not, attached to the warrant, is one exclusively for the judge, who tries the cause, to be decided by him upon inspection, and is a mixed one of law and fact. In this case his Honor below decided, that the scroll affixed to the name of the magistrate, and certified by him to be his seal, was a seal. Thereby the *fact* of its existence was adjudicated. This court is established to correct errors of law, and not errors of fact. If, therefore, the judge had erred in his judgment in the matter of fact submitted to him, we could not correct the error. *State* v. *Isham*, 3 Hawks., 185. What were the other defects in the warrant, upon which the defendant relied, we are not informed, and are not able, upon an inspection of it, to ascertain.

PER CURIAM. Judgment affirmed.

ELIJAH MATTHEWS v. PENNILL GILREATH, et. al.

Under the act of 1848, relating to the county of Polk, all the records, transferred to the superior court of Polk from the county of Rutherford, are directed to be returned to the superior court of Rutherford county, the act of 1846 establishing the superior courts in Polk having been repealed by the act of 1848; *Held*, that the superior court of Rutherford had the right to issue an execution on a judgment, rendered in the county of Polk, while the latter had jurisdiction, as to cases from the former county, removed by the act of 1846 and retransferred by the act of 1848.

Appeal from the Superior Court of Law of RUTHERFORD County, at the Spring Term, 1850, his Honor, Judge *Caldwell*, presiding.

This is a motion, made by the defendants in Rutherford superior court, to set aside an execution issued from that court against them: and these are the facts, on which it is founded. In 1846 acts were passed, to establish a county, called Polk, out of parts of Rutherford and Henderson counties, and also establishing superior and county courts therein. In 1848 those acts were repealed, and in a supplemental act, ch. 19, the clerk of the superior court of Polk is required to make out a transcript of all suits pending therein, and where either or both of the parties live in that part of Polk, which was taken from Rutherford, to deliver the same, with the original papers relating to such transcripts, to the clerk of the superior court of Rutherford; with a similar requisition, to deliver to the clerk of the superior court of Henderson the transcripts of the cases, in which the parties live in that portion, which was taken from Henderson. The third section of the act further requires of the clerk of the superior

court of Polk, to deliver "all the records and dockets belonging to his office to the clerk of the superior court of Rutherford." By the 15th section, it is further enacted, that the clerks of the superior courts of Rutherford and Henderson, respectively, shall have the same power and authority over the records and papers, which are hereby required to be transferred to their offices, as if such records and papers had before belonged to the offices of the clerks of Rutherford and Henderson. The execution in question is a *fieri facias* on a judgment rendered in Polk superior court in 1848, of which the original record was removed into the superior court of Rutherford, and which, according to the record, remained unsatisfied. The alleged ground of the motion was, that the clerk of Rutherford superior court could not issue a *fieri facias* upon a judgment rendered in the superior court of Polk. The court refused the motion, but allowed the defendants to appeal.

J. G. Bynum, for the plaintiff.
N. W. Woodfin, for the defendant.

RUFFIN, C. J. The legislature is competent to direct, where the records shall be kept and what officers shall from time to time issue lawful process upon them. The only question, therefore, is whether, by the proper construction of the act of 1848, executions are to be issued from the superior court of Rutherford on judgments rendered in the former superior court of Polk. It would seem, that there could not be a doubt upon it. The acts abolish Polk county, its courts and clerk's offices, excepting only, that the clerk is kept in office until he can perform the duty of transferring the records, as directed in the act. The provisions upon that subject are not the same in respect to both counties. They are, that of the

suits pending, transcripts shall be made, and, together with the original papers, relating to the respective transcripts, shall be delivered by the clerk of Polk in the following manner: that is, to the clerk of Henderson, those in which the parties live in Henderson, and to the clerk of Rutherford those in which either of the parties lives in the latter county. In that mode, are disposed of all the undecided cases. Then, as to the cases, which had been decided, the provision is plenary, with the exception of the original papers relating to pending suits, which go with the respective transcripts of those suits—"all the records and dockets belonging to his office" are to be delivered by the clerk of Polk to the clerk of Rutherford superior court. It obviously follows, that the execution is to issue from the court, in which the record of the judgment is; it can issue from no other; and, as the legislature could not mean, if within its power, to deprive the citizen of the benefit of his judgment rendered in Polk, he must be entitled to execution on it from the court of Rutherford. That is rendered still clearer, if possible, by the command in the 15th section to the clerks of Henderson and Rutherford to act on those records and papers, thus transferred, as if such records and papers had originally belonged to their offices; which, no doubt, was intended to enable and require those clerks to proceed immediately in those cases, without any special direction of the court, according to the course of the office. It must, therefore, be certified, that there was no error in refusing the motion.

PER CURIAM. Ordered accordingly.

EDWARD RIPPEY v. W. J. T. MILLER, Adm'r, &c.

In an action against the representative of a deceased, who had committed a trespass on the property of the plaintiff, the plaintiff cannot, no matter however aggravated the trespass may have been, recover vindictive damages.

Appeal from the Superior Court of Law of CLEVELAND County, at the Spring Term, 1850, his Honor, Judge *Caldwell*, presiding.

The action is trespass *quare clausum fregit*, and was tried on the general issue. The declaration and evidence were of an entry on the plaintiff's land by the defendant's testator secretly in the night, and maliciously burning a cotton gin-house and divers articles therein, and killing a horse; and evidence was further given for the plaintiff, that the house and other property were of the value of $750. The counsel for the defendant, thereupon insisted before the jury, that he, being an executor, was liable only for damages to the value of the property destroyed. But, in summing up, his Honor instructed the jury, that where a trespass is committed, under circumstances of aggravation, by a person moved thereto by malice, the jury was not restricted to the value of the property in assessing the damages against the wrongdoer or against his executor, but they might, if they thought proper, give vindictive damages against either. Damages of $1,500 were given; and the defendant appealed from the judgment.

J. G. Bynum and *Landers*, for the plaintiff.

Gaither, with whom was *Alexander*, for the defendant, submitted the following authorities:

Revised Statutes, ch. 2d, sec. 11th, p. 57th. *Brown* v. *Blick*, action of waste; see Judge TAYLOR'S remarks on the Statute of Gloucester, at p. 518. 3 Murphy, 511. *McLure* v. *Miller*, action for the seduction of his daughter. 4 Hawks, 133. *Wylie* v. *Smitherman*, trespass *quare clausum fregit.* 8 Ired, 236.

RUFFIN, C. J. As the case appeared, it would have been a proper one for insisting to the jury on vindictive damages against the trespasser. The question is, whether damages of that character can be given against his representative. The court is of opinion that they cannot. An action for a *tort* was lost at the common law by the death of either party, the injured or the injurer, upon the maxim, *actio personalis moritur cum persona.* That, in some cases, produced great hardship; as *torts* differ in their nature, some consisting of violence and insult to the person, or injury to the character and feelings; and, for such, ordinarily, there is no precise measure of damages, but they are in their nature vindictive, and in a great degree lie in the discretion of a jury. Others consist of injuries to or in respect of property; and for them, the natural and legal redress is to restore the value of the property destroyed, or to the extent of the deterioration of the property.

In cases of the former class, the death of a party prevents the great objects of an action from being attained, while it has no such effect in the latter, as the object then is to reimburse, out of the estate of the wrong-doer, the loss, which the other party has sustained in his estate by the act of the wrong-doer; and it is plainly just that he should thus be made whole. It is true, the common law put both cases on the same ground and gave no remedy

in either. But upon the distinction mentioned, the legislature of this state, in 1799 and 1805, passed two acts, which were incorporated into one section of the Revised Statutes of 1836, whereby, amongst other things, it is enacted, that actions of trespass and trespass on the case shall survive against executors, when they are not merely vindictive, that is, where property either real or personal is in contest, or where such actions are brought for damages done to such property. Rev. St., ch. 2, sec. 10. The affirmative language used and the negative provision respecting vindictive actions, taken together, show the principle of the enactment to be, that in respect to a loss sustained by one in his property from the wrongful act of another, there shall be a commensurate redress in damages, notwithstanding the death of either or both of the parties. In respect, however, to injuries to the person or to the feelings, before alluded to, and for which such actions only lie, as in their nature are vindictive, it was deemed wisest to leave the law as it was before. The present case presents an instance of a third class of cases; in which the action is for damages done to property, and, to that extent, cannot be said to be vindictive, and, under the statute, undoubtedly survives. But if the action were between the original parties, the jury might go beyond the loss to the plaintiff in his estate and assess the damages in reference to the circumstances of insult or other aggravation—which are called in the books, by the various names of exemplary, or vindictive damages, or smart money; all signifying much the same, and denoting that such damages are not for the injury to the property, that is, merely therefor, but for something over and above that. Now with regard to damages of this latter character, the Court thinks the action of trespass is not preserved by the act after the death of one of the parties. For, as the act gives the action between executors for property or damages

done to property, and in those cases only, and, moreover, is particular to exclude from its operation vindictive actions, it seems to be a necessary construction, that, however it might be between the original parties, yet, as between the representatives, the action is not to survive in respect to its vindictive features, but only as far as to give reparation for the pecuniary loss, by reason of the destruction of the property or damage done to it. As far as an action is vindictive, there is the same reason, why it should not survive, as there is against one purely vindictive surviving at all. This seems to be the unavoidable interpretation of the act as applicable to such a case, and it is believed, there is no decision to the contrary. It was indeed urged in the argument, that a different doctrine was laid down in *Wylie* v. *Smitherman*, 8 Ire., 236. But that is a mistake; for certainly, no such thing was intended, and what was said there meant only, that, even assuming that to be a proper case for vindictive damages, it was erroneous in the Court to lay down their measure, instead of leaving that to the jury. The point whether an administrator was liable for vindictive damages, was not considered, nor in truth, did it occur to the Court.

PER CURIAM. Judgment reversed and *venire de novo*.

THE STATE to the use of JACOB RANSOM, et al. *v.* ROBERT THOMAS, et al.

It is the rule in this country to apply payments to the debt, for which the security is the most precarious, when no application is made by the party who pays.

The cases of *Moss* v. *Adams*, 4 Ire. Eq., 42, and *State* v. *Thomas*, 10 Ire., 165, cited and approved.

Appeal from the Superior Court of Law of HENDERSON County, at the Spring Term, 1850, his Honor, Judge *Caldwell*, presiding.

This is an action on the official bond of the defendant, executed by him as sheriff of Henderson, for the default of his deputy, J. J. Summey. The breaches assigned were, that the said deputy had not used due diligence in collecting certain debts, placed in his hands for collection, and, in the second place, had collected the same and refused, on demand, to pay over the money to the relators. The execution of the bond declared on was admitted and that the said Summey was the defendant's deputy during his official term, commencing in September, 1842. The relators read in evidence a receipt signed by the said Summey, for sundry notes, which was in the usual form of officers' receipt for notes given them to collect. It was admitted, that all the debts set forth in the same were on solvent persons, except the McCarson debt, and for that the relators did not claim to recover. The defendant's counsel admitted, that the debts had been all collected, except the said McCarson debt, and the debt on Brittain & Johnson. The defendants then shewed, that the said deputy had paid the relators $50 on the 28th of July, 1843; $437.43 on the 2nd of November, 1843; $100 on the 2nd

of June, 1844; $85 on the 7th of July, 1844; $40 on the 26th of December, 1845, and $20 on the 2nd of November, 1846.

The relators then called William Brittain, who proved, that he paid said Summey on the debt due from him and Johnson mentioned in the said receipt, in February or March, 1843, something over two hundred dollars in corn, and $40 in claims on the county of Henderson, and, in the fall of said year, he paid said Summey $90 in cattle and $40 in county claims, and, in the fall of 1844, paid off the balance of said note in cattle, and took it up. The credits were endorsed thereon from time to time according to the amount paid.

It appeared on the trial, that the relators resided in Lincolnton, some seventy miles from Henderson. There was no evidence tending to shew, that the relators had authorized the said Summey to collect the debt on Brittain & Johnson in anything but money, or that they knew of the kind of payments made thereon, or that they ratified the same thereafter. The relators offered no proof to shew, that any of the other debts set forth in the said receipt had been collected, except the said Brittain & Johnson debt. There was no evidence of the application of the money paid by the said Summey to the relators, nor any evidence of any directions given by him as to its application. The counsel of the relators, in opening the case, stated that the money paid by the said Summey had been applied to the extinguishment of the Brittain & Johnson debt, and this suit was brought for the default of the said Summey in relation to the other debts set forth in the said receipt.

The defendant's counsel insisted, that the money paid ought not to be applied to the Brittain & Johnson debt, there being no evidence, that the said Summey had con-

verted the property by him secured into money, when he made the payments to the relators; that it made no difference, whether he received the property with or without authority, the money paid could not be presumed to be the proceeds of the said property, unless there was evidence to show, that he had received money for the property, before the payments were made. The court charged, that if Summey, the deputy, received property and county claims in payment of the Brittain & Johnson debt, without authority from the relators, and there was no subsequent ratification by them, then he became their debtor to the amount of the said debt, and it was not material, whether he converted the same into money before he made the payments to the relators or not. And the court further charged, as it did not appear that any application of the money had been made by the relators or directed by the said Summey, that the money proved to have been paid ought to be applied, first to the Brittain & Johnson debt, and, if there was a balance, then to the debts set forth in the said receipt, which were within the jurisdiction of a justice of the peace, and on persons admitted to be solvent. The jury found according to the charge of the court. A new trial was moved for and refused, judgment rendered on the verdict, and the defendant appealed.

J. Baxter, for the plaintiff.
J. W. Woodfin, for the defendant.

PEARSON, J. This case was before the court at its last term and is reported 10 Ire, 165. It was then held that no judgment could be rendered on the special verdict, because it did not appear, that any of the claims had been collected, so as to make a debt or demand "to which the payments could be applied;" so the question as to the

application of money, which was intended to be presented, did not arise.

But it was intimated, that if the deputy had collected anything on the note of Brittain & Johnson, the payments ought, first, to be applied to that demand, because it is the rule in this country, to apply payments to the debt, for which the security is the most precarious, when no application is made by the party who pays. *Moss* v. *Adams*, 4 Ire. Eq., 42, was cited in support of the position. Upon the second trial, it was proven, that the deputy had collected the whole of the note of Brittain & Johnson; not, it is true, in money, but in horses and cattle, which he received as money, and gave up to them their note, and the judge in the court below held, that this was such a collection of the claim, as to make it a debt or demand, to which payments could be applied, and that, in the absence of any proof, that any collections had been made, upon any of the other claims and paid over to the relators, it was proper to apply the payments to the extinguishment of the claim upon the bond of Brittain & Johnson, although it was not proven, that the deputy had sold the horses, cattle, &c., and realized the money from such sales. We see no error in this opinion; it fully accords with the intimation given in the case, when it was last before us, which was in accordance with the law, as held in *Moss* v. *Adams*.

PER CURIAM. Judgment affirmed.

DEN ON DEMISE OF ELIJAH CHASTIEN v. DANIEL PHILIPS.

Where a deed was delivered merely as an escrow, and never absolutely, was not registered and was finally destroyed by the maker, by the consent of the party, to whom it purported to be made, it cannot constitute a color of title.

Appeal from the Superior Court of Law of HAYWOOD County, at the Fall Term, 1849, his Honor, Judge *Ellis*, siding.

This action was commenced September 29th, 1847, and the declaration is on the several demises of Elijah Chastien and Samuel Higdon. On the trial, a title was deduced from the State to Chastien, and it was shewn that, early in 1841, he conveyed in fee to the other lessor. On the part of the defendant, evidence was then given, that, prior to 1839, Chastien contracted to sell the premises in fee to Leonard Higdon, and gave his bond or covenant to make the conveyance, when the purchase money should be paid: that the price was fully paid, and that, in the latter part of that year or early in 1840, the said Leonard sent one Coward to Chastien, who lived in South Carolina, to get a deed, and that Chastien executed a deed, but, in consequence of Leonard Higdon's omission to send Chastien's covenant by Coward, he, Chastien, refused to deliver it absolutely, and put it into the hands of the said Coward, with directions to deliver the deed to the said Leonard, on his surrendering to that person the bond which Chastien had given; that Coward, upon his return, shortly thereafter, offered to deliver the deed to the said Leonard, as directed by Chastien, if he, the said Leonard, would sur-

render to him the said bond or covenant; but the said Leonard refused to surrender the same or to accept the deed sent, and remarked to Coward, that he might hold on to the deed, until he should pay him a small sum, which he owed him; and that, about a year afterwards, the said deed was destroyed by Chastien, by the consent of the said Leonard, without ever having been delivered to him personally, or otherwise, than as above set forth; and, by the direction of the said Leonard, a deed was then made by Chastien to the said Samuel Higdon. Evidence was further given on the part of the defendant, that, in June, 1840, certain executions, issued by a justice of the peace, against the estate of the said Leonard, were levied on land, and orders of sale made thereon in the county court, and that writs of *venditioni exponas* were then issued and the premises sold by the sheriff on the 5th of October, 1840, to a person under whom the defendant claims; and that, in December, 1840, the defendant claimed the land under the title derived from the sheriff's sale, and, upon his demand, the said Leonard surrendered the possession to the defendant, who then entered, and, in July, 1841, the sheriff made a deed to the purchaser, and the defendant continued in possession up to the trial. On this, the court held, that the purchaser did not acquire a title under the sale of the sheriff, because the writ of *venditioni exponas* did not describe or include the premises. Thereupon, the counsel for the defendant insisted, that the defendant was entitled to the benefit of the possession by Leonard Higdon and that it perfected the defendant's title.

The court instructed the jury, that, supposing the evidence to be true, it established the due delivery of the deed, so made, to Leonard Higdon by Chastien; and that the possession of the premises by the said Leonard and by the defendant together, for more than seven years after the deed was delivered to Coward by Chastien, was such

an adverse possession under color of title as vested the title in the defendant. There was a verdict for the defendant, judgment and appeal.

J. Baxter and *G. W. Baxter*, for the plaintiff.

N. W. Woodfin and *Gaither*, for the defendant.

RUFFIN, C. J. As the sale and conveyance by the sheriff are to be deemed void in the present state of the case, they are to be put out of our consideration, except so far as they may be color of title and enable the defendant to make a title under the statute of limitations. But he cannot do that, because the action was commenced in less than seven years from the defendant's entry, and, indeed, from the sheriff's sale. It is clear, then, that the title cannot be in the defendant, and the instruction on that point was erroneous. The title, therefore, must be in Chastien or one of the Higdons; and unless it be in Leonard Higdon, the plaintiff must recover on the demise of one of the other two persons. The Court holds, that Leonard Higdon has not the title. The deed to him, if delivered absolutely, did not pass the title, for want of registration; and, therefore, at most, it could only be color of title. Now, supposing that the possession of the defendant may be connected with that of L. Higdon, so as, together, to constitute a sufficient length of a possession, yet it cannot enure to vest the title in L. Higdon, because his possession was never adverse to Chastien, and, indeed, the supposed deed to him never, in point of law, became a deed. He entered originally as vendee under articles, and, of course, that possession was not adverse to his vendor. Its character, however, would be changed by the execution of a deed and its acceptance by him; and it has been held, that a deed, not otherwise defective, is color of title, though not registered. But it seems impossible to allow that operation to an instrument,

which is not only unregistered, but which never took effect as a deed—being merely an escrow and, by the consent of the party, to whom it purported to be made, destroyed by the maker before a final delivery to the party. It is true, there cannot be a delivery to the party himself as an escrow; and a deed thus delivered is absolute.

It is likewise true, that an unconditional delivery to Coward, as the agent of L. Higdon, would have made the deed complete at once. But there was, in fact, no such unconditional delivery in this case. It is nowhere laid down as a principle, that a delivery to one, who is the agent of the bargainee, cannot be conditional, but must be absolute, as if the delivery were to the bargainee himself. Nor can that be the law, since, after the bargainor's refusal to deliver the deed absolutely to the agent of the other party, there is no reason why the bargainor may not make the same person his agent to take the deed, and deliver it, upon the performance of certain conditions by the other party. There is no repugnancy in such a transaction, as there is, when the delivery is directly to the party himself; and, therefore, the instrument may be allowed to operate according to the actual intention of the parties, which is always the justice of a case and to be ascertained when the intention is not contrary to law. It is plain, then, that this deed was not delivered to Coward, as the agent of Leonard Higdon, but that it was put in his hands, as the agent of Chastien, to be delivered upon getting up the original articles of sale; and that it never was delivered to L. Higdon, but, when offered, was rejected by him. It was, therefore, no more than an escrow at any time during its existence, and it so continued, by reason of the party's own refusal to accept on the conditions specified. Now, it cannot be held, or even admitted, that L. Higdon held possession of the premises under the deed, which he had not received, but had thus explictly

rejected; and the very idea of possession under color of title is, that it is a possession taken or held by one under an instrument, which purports to convey, or under which he claims, an estate in the land.

That person never did set up the claim under the deed, but, after its execution, as before, his possession was under, and merely subsidiary to, the title of his vendor. The subsequent surrender by him of the possession to the defendant could not affect this point, under any circumstances. But, it is plain, that it proceeded altogether from a mistake of the parties, as to the validity of the sheriff's sale; for, if it had been good in other respects, it would have been effectual under the act of 1812, without regard to the deed from Chastien, as L. Higdon had, before, fully paid for the land, and Chastien held upon a pure trust for him. Whether his title was legal or equitable then, he conceived himself obliged to let the purchaser from the sheriff into possession; and no inference can be drawn from that fact, which can operate one way or the other on the deed. There has not, therefore, been seven years' possession, under color of title, adverse to the lessors of the plaintiff, and there ought to have been a verdict against the defendant, upon the one demise or the other.

PER CURIAM. Judgment reversed and *venire de novo.*

GEORGE BROOKS v. ANN JONES.

In an action for malicious prosecution, the plaintiff must shew particular malice on the part of the defendant towards him.

This particular malice may be proven by positive testimony of threats or expressions of ill will, used by the defendant in reference to the plaintiff, or it may be *inferred* from the want of probable cause and other circumstances, such as, in this case, are apt to engender angry feelings.

Appeal from the Superior Court of Law of BUNCOMBE County, at a Special Term in February, 1850, his Honor, Judge *Caldwell*, presiding.

This is a suit for a malicious prosecution. The defendant sued out a state's warrant against the plaintiff and others, charging them with shooting and cutting her horses, in the night time, which was tried before a magistrate and dismissed. On the trial the defendant introduced testimony tending to shew that she had probable cause for suing out the state's warrant. The court charged the jury, that, if the facts deposed to by the witnesses were true, there was probable cause, and further charged, that if they did not believe the witnesses, then, to entitle the plaintiff to recover in this action, he must shew express malice on the part of the defendant. The defendant's counsel asked the court to charge the jury, what was meant by express malice, and the court said it meant ill will, grudge and to revenge herself. The only evidence on the part of the plaintiff, as to malice, was the existence of an action of trespass, instituted by the defendant and her son against the plaintiff and his father-in-law.

The jury returned a verdict for the defendant, and from the judgment thereon the plaintiff appealed.

J. Baxter, for the plaintiff.
J. W. Woodfin, for the defendant.

PEARSON, J. His Honor was of opinion, that the plaintiff must shew express malice on the part of the defendant. Being requested to explain what was meant by express malice, he replied, "ill will—grudge—to revenge herself." To this the plaintiff excepts.

If his Honor had said particular, instead of express, malice, his meaning would have been more clearly conveyed.

General malice is wickedness, a disposition to do wrong, a "black and diabolical heart, regardless of social duty and fatally bent on mischief." This is malice against mankind, and was the definition, insisted on by the plaintiff's counsel, in the argument before us.

Particular malice is ill will, grudge, a desire to be revenged on a particular person, which is the definition given by his Honor.

The case, then, as we infer, was intended to present this question. In an action for malicious prosecution, is it sufficient for the plaintiff to shew, that the defendant, in instituting the prosecution, was influenced by general malice, or must he shew, that the defendant had particular malice against him? His Honor thought the plaintiff must shew particular malice, on the part of the defendant, towards him. We concur in this opinion. 1 Step. *nisi prius*, 2295.

This particular malice may be proven by positive testimony of threats or expressions of ill will, used by the defendant in reference to the plaintiff, or it may be *inferred* from the want of probable cause and other circumstances, such as that set out in the conclusion of the case —the pendency of a law suit between the parties, which is apt to engender angry feelings.

We do not understand from the manner in which the case is made up, and it was not contended in the argument,

that his Honor meant to lay down the position, or was so understood, by the use of the term "express malice," that the particular malice, necessary to support the action, must be proven by positive testimony of ill will, and that it could not be inferred by the jury, from a want of probable cause or other circumstances. When there is a total want of probable cause, the jury will infer malice, almost of necessity; as a prosecution, wholly groundless, cannot be accounted for in any other way.

PER CURIAM. Judgment affirmed.

JOHN BUTTS v. ANDREW J. PATTON.

Under the statute of 1826, the presumption of the payment or satisfaction of a judgment does not arise, until ten years after the plaintiff has ceased to prosecute his judgement, that is, until ten years after the day of the return of his last execution.

The plea of payment to an action on a judgment, &c., is sufficient to cover the defense of a presumption of payment or abandonment of claim under our act of 1826.

The case of *Gilky* v. *Dickinson*, 2 Hawks., 341, cited and approved.

Appeal from the Superior Court of Law of MACON County, at the Fall Term, 1849, his Honor, Judge *Ellis*, presiding.

Gaither, *N. W. Woodfin* and *J. W. Woodfin*, for the plaintiff.

J. Baxter, for the defendant.

NASH, J. The action is in debt, and brought on a judgment, rendered against the defendant in favor of the plaintiff in the state of Georgia. That judgment was obtained at October term, 1837, of Habersham superior court, and an execution issued from that term to the April term, 1838, of the said court. On the 20th November, 1837, the sheriff returned the writ, with the endorsement "no property." No other execution issued on the judgment. The writ, in this case, issued on the 4th of March, 1848. The defendant, among other defenses, pleaded "payment," and it was insisted by him, that more than ten years had elapsed since the judgment was obtained and before the issuing of the writ in this case. The plaintiff insisted, that the presumption of payment did not arise—first, because ten years had not elapsed from the term of the court, to which the *fi. fa.* issued on the said judgment was made returnable and the commencement of this suit; secondly, because the statute, giving the presumption, was not sufficiently pleaded; and thirdly, because the statute did not apply to a judgment obtained in Georgia, where no such statute existed. The court was of opinion, that, from the lapse of time, a presumption arose, that the judgment, upon which this action is brought, was paid, and that presumption operated upon a judgment obtained in another state, as well as one obtained in this. The jury found a verdict for the defendant and the plaintiff appealed.

Under the view we have taken of this case, it is not necessary for us to express any opinion upon the question, whether the act of 1826 applies to a judgment obtained in a sister state, for, whether it does or not, the presumption of payment does not arise here. The act provides,

that the presumption of payment or satisfaction of all judgments, &c., shall arise within ten years after the cause of action on the same accrues, &c. Rev. St., ch. 65, sec. 19. The question then is, from what period does the act begin to operate? Literally, from the rendition of the judgment, for then the plaintiff can bring his action upon it. Was that the meaning of the legislature? We presume not, for the act goes on to provide, that the action shall be brought under the same rules, regulations and restrictions, as now exist at law. The statute of limitations does not apply to either bonds or judgments. With respect to the former, the doctrine of twenty years, raising a presumption of payment, was at an early period laid down by Lord HALE, who thought it merely a circumstance from which a jury might presume payment. The rule was followed, until at length it became the settled law of the court. It was, however, a presumption, which ceased to exist, when a sufficient cause was shewn, why the action had not been sooner brought. Thus, when it is shewn that the debtor has been insolvent and unable to pay. *Hull* v. *Horace*, Cow., 109. So when a receipt for interest is endorsed on the bond by the payee, if it appears to have been made at a period, when it was not the interest of the payee to make it, as when the twenty years had not elapsed at the time of the endorsement. *Tucker* v. *Crisp*, Sh., 827; *Rose* v. *Bryant*, 2 Camp., N. P., 321. So when a demand has been made within the twenty years. *Oswald* v. *Legh*, 1st Term. Rep., 270.

The principle, established by these cases, is, that when the plaintiff shows that he could have derived no benefit by bringing his action sooner, or that the defendant has, within the twenty years, acknowledged the debt to be a subsisting one, by either paying interest on it, or by promising to pay it, or that, within the prescribed period, he, the plaintiff, has demanded payment, in other words has been endeavoring to get his debt paid, the presump-

tion of payment will not arise. Such were the rules and regulations, governing the presumption of payment at common law upon the lapse of time. In this case, the judgment was obtained at October term, 1837, of the court. From that term an execution issued, returnable to April term, 1838. The legal time, which that execution had to run, was six months, to-wit, " until the first day of the court in April ;" and in contemplation of law, up to that time, the plaintiff was endeavoring to collect his judgment. So far as his rights were concerned, in this particular, the return of it by the officer in November, 1837, had no effect. It was the act of the officer, voluntary on his part, and done, most probably, to free himself from the custody of the process. As evidence, that its return did not affect the rights of the plaintiff, on the question we are now considering, if he had caused an *alias fi. fa.* to issue from the April term, 1838, of Habersham superior court, the law would have considered it so connected with the preceding one, that the defendant would have had no power to dispose of his property, between the time, when the first writ was actually returned and the issuing of the *alias*, so as to defeat the latter. The lien, created by the original, would have been continued in the *alias*. *Gilky* v. *Dickinson*, 2 Haw., 341. In law, then, the plaintiff was endeavoring to enforce his judgment up to April term, 1838, of the court, in which it was obtained. The time specified in the act did not expire until April, 1848. The writ in this suit was issued in March of that year. Suppose that executions had regularly issued from time to time of Habersham superior court, could it be pretended, that a presumption of payment or of abandonment of his claim by the plaintiff could have arisen ? Very clearly not. And why not ? Simply, because, it would be manifest, he had not abandoned his claim, which would rebut the idea of a payment. So

here, ten years have not elapsed, since the plaintiff ceased to prosecute his claim under his judgment and the issuing of his writ. The legal presumption authorized by the act of 1826 does not arise in the case.

By the plaintiff, it is further objected that the statute is not sufficiently pleaded. We think, the plea of payment is sufficient; the statute need not be pleaded: it only raises a presumption, which is evidence under the plea of payment.

PER CURIAM. Judgment reversed and *venire de novo*.

GEORGE PLATT v. F. W. POTTS, et al.

A judgment either before a magistrate or in a court of record, is not the subject of an action of trover and conversion; nor is a note, on which a judgment has been obtained, because it is merged in the judgment and is defunct.

Appeal from the Superior Court of Law of HAYWOOD County, at the Fall Term, 1849, his Honor, Judge *Ellis*, presiding.

N. W. Woodfin, for the plaintiff.
Henry and *J. W. Woodfin*, for the defendant.

PEARSON, J. This was trover. One count was for the conversion of a magistrate's judgment for $100 against one Tulbright. The other was for the conversion of a note for $100 on said Tulbright. The proof was, that Tulbright had given the plaintiff a promissory note for

$100. The plaintiff, by his agent, endorsed the note to one Allen, in anticipation of a trade, which was not concluded, and the plaintiff then handed the note to the defendant, Potts, a constable, for collection, without striking out the endorsement to Allen. Potts took a judgment against Tulbright on the note, and afterwards sold the judgment to the other defendant, Penland. The defendants, upon demand, refused to give up to the plaintiff either the note or the judgment; he then brought this action.

The judge in the court below was of opinion, that the plaintiff could not recover on the first count, because "a judgment," of a magistrate was not a thing, that could be recovered in trover. This is settled. *Cobb* v. *Cunningham*, 6 Ire., 368. But he was of opinion, that the plaintiff could recover for the conversion of the note, "if the jury was of opinion that there had been a conversion of the note by the defendants; either by procuring a judgment to be rendered on it, or otherwise." To this part of the charge, the defendants except, and we think the exception well founded.

There was no wrongful conversion of the note, by taking a judgment on it, in the name of Allen. The endorsement passed the legal interest to him, and it was the plaintiff's fault not to strike out the endorsement, and, although the beneficial interest, according to the facts of the case, was still in the plaintiff, the defendant, Potts, did nothing more than his duty in taking the judgment as he did. The judgment nullified the note, and it was, therefore, of no force or effect, and ought to have been cancelled by the magistrate and filed away by him, and, in strictness, he ought also to have kept the judgment (or rather the paper on which the judgment was written,) as evidence of his adjudication, in which both the plaintiff and the defendant were interested, but to which neither of

them had any right, because it ought to be kept by the magistrate, so as to enable him to make a due return if a writ of *recordari* should issue. The rights of the plaintiff could be enforced by issuing an execution on a separate piece of paper, and the rights of the defendants (if he should ever be sued again, for the same cause,) could be protected by a reference to the judgment, &c., still remaining in the hands of the magistrate, as a *quasi* record.

We, therefore, do not concur in the opinion, that a note, after a judgment has been rendered on it in the name of the apparent legal owner, can be the subject of an action of trover. A judgment is a thing merely in contemplation of law, and trover will not lie for its conversion, whether it be the judgment of a court of record or of a magistrate. A note, after judgment has been taken on it, is defunct, has no existence and is not a thing, either in fact or in contemplation of law, and therefore trover cannot be sustained.

PER CURIAM. Judgment reversed and *venire de novo*.

JOSEPH COCKERHAM v. JOHN NIXON.

As soon as the owner of an animal knows or has good reason to believe, that he is likely to do mischief, he must take care of him and be responsible for any injury that he may inflict; and it makes no difference, whether this ground of suspicion arises from one act or from repeated acts.

The act done, however, must be such as to furnish a reasonable inference, that the animal is likely to commit an act of the *kind complained of:* this is a matter to be decided by the jury and not by the court.

Appeal from the Superior Court of Law of SURRY County, at the Spring Term, 1850, his Honor, Judge *Dick*, presiding.

H. C. Jones, for the plaintiff.
Boyden, for the defendant.

PEARSON, J. This was a case, for an injury done to the plaintiff's horse by the defendant's bull. The plaintiff proved, that a bull of the defendant, while running at large, gored his horse and killed it. One Cannady swore, that before the horse was killed, he was giving salt to a cow, when the bull came up—whereupon the bull made after him and forced him to jump on a fence near at hand, and he stated these facts to the defendant and told him, he would have shot his bull, if he had had a gun.

The court charged, that it was not necessary to shew, that the defendant had knowledge of a vicious habit of the animal by proof of many acts, but that knowledge of one vicious act, shewing him to be dangerous, would be sufficient to render the defendant liable, and that the testimony of Cannady did bring home to the defendant such a knowledge of the vicious propensities of the animal, as

would require him to prevent the animal from going at large, and, so far as this point was involved, the jury would be authorized to find for the plaintiff.

The defendant excepts to this charge. We concur in the general proposition, that the allegation in the declaration, that the bull had a vicious habit and was accustomed to do mischief, which was known to the defendant, may be sustained by proof of a single act, provided it be of such a nature and is committed under such circumstances, as to satisfy the jury, that the animal was vicious and too dangerous to be allowed to go at large. Such fact coming to the knowledge of the owner, is notice sufficient to put him in the wrong, and make him liable for the consequences of his neglect to keep the animal confined.

The cases cited by the plaintiff's counsel fully sustain this position. *Jenkins* v. *Turner*, 1 Ray., 109; 3 Car. & Pa., 138; 1 Bar. & Ald., 620; 1 Holt, 617; Leigh, *nisi prius*, 552; Buller, *nisi prius*, 77; 2 Esp. Rep., 482. One act may sometimes furnish as convincing proof of the viciousness of an animal as a dozen, and the jury are, therefore, allowed to make the inference from a single act. The idea, that the owner is not liable until the mischief has been known by him to be repeated time after time, is absurd; how many horses, must the owner know his bull to have killed, before he becomes liable? The rule is, that as soon as the owner knows or has good reason to believe, that the animal is likely to do mischief, he must take care of him; it makes no difference whether this ground of suspicion arises from one act or from repeated acts. The only restriction is, that the act done, must be such as to furnish a reasonable inference, that the animal is likely to commit an act of the *kind complained of*. This explains the case, in which it is held, that an action against the owner of a dog for killing a sheep, is not sus-

tained by proof of a *scienter* that the dog had bitten a man, without adopting the suggestion made by the defendant's counsel, that the "old cases" favored dogs more than useful animals. Upon the same principle, an action could not be sustained against the owner of a hog (a useful animal) for injury to the person of the plaintiff, by proof of a *scienter*, that the hog would eat young chickens and ducks.

We think, there was error in the particular proposition, laid down in reference to the effect of the testimony of Cannady.

When the owner knows or has reason to believe that an animal is dangerous, on account of a vicious propensity in him, from nature or habit, (a term used to denote an acquired as distinguished from a natural vice,) it becomes his duty to take care that no injury is done; and he is liable for any injury, which is likely to be the result of this known vicious propensity. But whether there be sufficient evidence of this vicious propensity, whether a single act, and the attending circumstances are such, as to justify the inference, are matters, in reference to which the jury must enquire.

If a dog is known to have killed one sheep—a jury would be able, from their knowledge of that animal, to infer, that he would kill another, if an opportunity presented itself. If so, the owner would, in law, be liable. But if a dog is known to have bitten a man, a jury would not be apt to infer that he would kill a sheep, because the one act proceeds from voraciousness, the other from combativeness, and fierce dogs are not so apt to be sheep killing dogs. If a bull so far loses sight of his submission to the "dominion of man," as on one occasion to rebel and offer combat, it does not follow, as a *matter of course*, that he would be likely to attack a horse, and that fact must be decided by the jury, from the nature of the animal, the

provocation and other circumstances attending the act. It was error for the court to decide "that the testimony of Cannady did bring home to the defendant such a knowledge of the vicious propensities of the bull," as would make him liable.

PER CURIAM. Judgment reversed and *venire de novo*.

ROBERT H. MAXWELL v. JOHN MILLER.

One may recover in an action of covenant or assumpsit, on a bill of sale for a slave, for a warranty of the soundness of the slave, although there be no witness to the bill of sale.

Appeal from the Superior Court of Law of MECKLENBURG County, at the Spring Term, 1850, his Honor, Judge *Dick*, presiding.

Thompson, *Boyden* and *Osborne*, for the plaintiff.
Craig and *Wilson*, for the defendant.

PEARSON, J. This was assumpsit, upon the warranty of the soundness of a negro. The warranty was contained in a bill of sale, given by the defendant, to which the wife of the defendant was the only subscribing witness. The plaintiff offered to prove the hand-writing of the defendant and that of his wife, in order to establish the warranty. The court rejected the evidence, and the plaintiff submitted to a nonsuit and appealed.

The objection to the reception of the evidence is, that the attestation of the defendant's wife, as a witness, is a nullity; and so the bill of sale has no attesting witness, and does not pass the title, and, for that reason, the warranty, which is an incident to the sale, is of no validity. The reply is: admitting the position, that, as between the parties, the title did not pass by the bill of sale, for want of an attesting witness, to be tenable; still, the warranty is distinct from that part of the bill of sale, which purports to pass the title; and there is no reason, why there should be an attesting witness to a covenant or contract of warranty of the soundness of a negro, nor necessity for its registration. And if a warranty be a mere incident of a sale, the title in this case might have passed by an actual delivery, without a bill of sale, and, so, there was no ground for the objection. This reply seems to be sufficient.

But it is evident, that the doctrine of warranty, as applied to real estate, has no sort of application to the warranty of the soundness of a chattel. Such a contract may be entirely distinct from, and unconnected with, a sale, and will support an action, provided there be a sufficient consideration, although there is no sale, to which it may be *incident*.

The opinion of his Honor is obviously erroneous.

The nonsuit must be set aside and a *venire de novo* issue.

PER CURIAM. Judgment accordingly.

WILLIAM MURPHY v. JAMES MCCOMBS.

Where a man, who is liable to militia duty, is arrested on a civil process while he is attending a militia muster, in violation of the act of assembly, he may plead the same in abatement.

Appeal from the Superior Court of Law of ROWAN County, at the Fall Term, 1849, his Honor, Judge *Caldwell*, presiding.

A. H. Caldwell, for the plaintiff.

Craig, for the defendant.

NASH, J. The writ in this case was served on the defendant on the 26th of April. The defendant pleaded in abatement, that, at the time of the service of the writ, he was attending his duty at a muster, as an officer of the militia, in the town of Salisbury, when the writ was executed. To this plea the plaintiff demurred. On the argument, it was insisted by the plaintiff, that the matter set forth in the plea could not be taken advantage of by a plea in abatement; but was proper only to set aside the return, for the reason, that such a plea went to the writ, and the complaint here was of the service.

In this we think there was error. The act of assembly, under which the defense is offered, expressly provides for this case. Rev. St., ch. 31. By the 32nd section it is provided, how writs and other process, except subpœnas, shall be executed and returned. The concluding paragraph of that section is as follows: "all process made returnable at any other term, or executed at any other time or in any other manner, than is by this act directed, shall be adjudged void on the plea of the defendant." The 58th section of the same act directs, "it shall not be lawful for any sheriff, or other officer, to execute any writ or other process, on a Sunday, or upon any person attending his

duty at a muster of the militia," &c. The law of the land, with regard to the militia, compels, under heavy penalties, all persons, who are liable to perform militia duty and have been properly enrolled, to attend musters; and the act we are considering protects them from arrest, while they are in the performance of this duty. The officers of the law are forbidden to execute writs in civil cases upon a militia man, while so engaged. The time, then, when this writ was executed, was in violation of the law; and the 53rd section directs, that the defendant shall avail himself of it by a plea. That the defendant was within the protection of the law is admitted by the demurrer. Whether, under the act of 1836, he could have availed himself of the objection by a motion to dismiss, it is not necessary to decide.

The decision below is erroneous and must be reversed.

PER CURIAM. Demurrer overruled and judgment for the defendant.

HUGH HAMILTON v. JOSEPH ELLER.

An obligation for a certain sum, payable in specific articles at a particular time and place, becomes, after it is due, necessarily an obligation payable in money, unless the defendant pleads and proves a tender of the articles, at the time and place mentioned in the contract.

Appeal from the Superior Court of Law of BUNCOMBE County, at the Spring Term, 1848, his Honor, Judge *Battle*, presiding.

This is an action of debt on a bond for $150, dated July 14th, 1842, and "payable January 1st, 1844, in good trading, to be valued and delivered at Eller's house." Plea, payment. Before the jury was empanelled, the defendant, upon the authority of a letter from the plaintiff to him, moved to dismiss the suit, but the court refused the motion. In support of the issue, the defendant gave evidence, that, before the bond fell due, and while the plaintiff held it, the plaintiff and the defendant agreed, that any debts of the plaintiff to other persons, which the defendant would discharge and take up, should be allowed as payments on this bond; and the defendant then produced several justices' judgments against the plaintiff to the amount of the bond, and alleged that he paid them before the bond fell due, but gave no evidence thereof. On the part of the plaintiff, evidence was then given, that, on the 1st of January, 1844, one Deaver, to whom the plaintiff had transferred the bond, attended at Eller's house to receive payment, and Eller then tendered him some old horses and other specific articles, of the value

of $150, as then alleged by the defendant, which Deaver refused to receive, on account of their deficiency in quality.

The court directed the jury, that the sums due on the judgments were not payments on the bond, unless the parties had applied them, or agreed to apply them, to it; and that, whether such was the fact or not, it was for them to enquire, and in doing so, they might consider that the defendant tendered other things in discharge of the bond, after the period at which he alleged he had paid it by taking in the judgments. The court also instructed the jury, that, unless they should find it to have been paid, they were to consider it as a bond for $150, payable absolutely in money, and allow interest accordingly. After a verdict and judgment for the plaintiff the defendant appealed.

N. W. Woodfin, for the plaintiff.
J. W. Woodfin, for the defendant.

RUFFIN, C. J. The motion to dismiss was not made by the plaintiff or his attorney, but by the defendant, and, as must be understood, against the will of the plaintiff at that time. The alleged letter, under which the defendant assumed the authority, is not set forth, and hence, it cannot be seen here, that it conferred it, and that his Honor erred, supposing that the motion could be entertained under any circumstances. We do not, therefore, consider that point; which, moreover, the defendant abandons, as he states, that both he and the plaintiff have been enjoined, at the suit of Deaver, from dismissing this suit.

The instructions to the jury were very indulgent to the defense, in leaving it to the jury to draw inferences to an extent not warranted by the defendant's own evidence. For he gave no evidence, that he had paid the judgments against the plaintiff; and, moreover, if he ever paid

them, he failed to shew that he did so before his plea in this suit. For this latter reason, if no other, the verdict should have been against the defendant on that issue.

The instrument is an obligation for $150, and is necessarily payable in money, unless it was discharged in specfic articles or the due tender of them at the day and place specified, of which there was no plea.

PER CURIAM. Judgment affirmed.

PAYTON COLVERT v. ALLEN WHITTINGTON.

In an action brought to recover a penalty for not working on a road in Wilkes county, laid off by commissioners, under an act passed in 1846, ch. 100, it is necessary, before a recovery can be effected, to shew that the commissioners were duly sworn as the act directs.

Appeal from the Superior Court of Law of WILKES County, at the Fall Term, 1849, his Honor, Judge *Caldwell*, presiding.

Boyden, for the plaintiff.

No counsel for the defendant.

NASH, J. By an act passed in 1846, ch. 100, sec. 3 and 4, commissioners were appointed "to view, lay off and improve the State Road from Alexander Church's to Payton Colvert's." The 4th section provides, "that before they shall enter upon their duties as commissioners, they shall

take an oath, before some justice of the peace for the county of Wilkes, to view and lay off the road the best and most convenient way, having strict regard to private property as well as to the public good, and shall assess all damages, &c., and shall report the same to Wilkes county court, &c., and the said commissioners shall appoint an overseer and allot him the hands necessary to open the said road, &c., and the hands so allotted him shall be subject to the same fines, as in other cases is now provided by law." Under this act the commissioners proceeded to view and lay off the road, as directed, appointed the plaintiff overseer, and allotted him the necessary hands, among whom was the defendant, to open the road. This action was brought by warrant to recover from the defendant the sum of four dollars, the fine imposed by law for refusing to work as a hand in opening the road. The defendant had been duly summoned. To support his action, the plaintiff produced in evidence two papers, purporting to be reports, made to the county court of Wilkes, of the laying off the road and the assessment of damages. Several objections were made to the plaintiff's recovery. It is deemed necessary to examine but one. It nowhere appears in the proceedings, that the commissioners were sworn. The act requires, that, before they enter on their duties they shall be sworn. This is required, as well in justice to the persons, whose interests may be affected by the location of the road, as to the public. It is said, that we cannot look beyond the action of the commissioners. If any action of the county court had been required upon the return made by them, it might well be questioned, whether we could look behind it; but, here, nothing is to be done by that tribunal, but to order the payment of the damages assessed. They are not required to record the proceedings of the commissioners. We are not only at liberty, therefore, to look into these proceedings, to see that they are regular and according as the law

directs, but it is our duty to do so. We cannot, otherwise, ascertain the liability of the defendant to work on the road in opening it. The commissioners, under the act, have limited the special powers; and it must appear, that all has been done by them, which is required before their acts can be legal and valid. The taking of the required oath is a condition to their entering upon the discharge of their duties. This not appearing is as if it did not exist.

PER CURIAM. Judgment affirmed.

ELISHA JONES v. MILES B. ABERNATHY.

When slaves, by a will made by a testator in South Carolina, were directed to be emancipated, and then the testator says "all the balance of my estate to belong to C. J."; *Held*, that C. J. could not claim these negroes at law under the residuary clause, even if the bequest for emancipation were void by the laws of South Carolina, because they did not pass by the words of the residuary clause, but only fell into the residue by the operation of the law, and C. J's. title was only an equitable one.

Held, that this court cannot presume, that the emancipation of slaves is void by the laws or policy of South Carolina, but that this fact should have been proved.

Appeal from the Superior Court of Law of LINCOLN County, at the Spring Term, 1850, his Honor, Judge *Dick*, presiding.

This is a special action on the case, tried on not guilty pleaded. On the declaration and evidence the case is as

follows: William Barry, of Fairfield District, South Carolina, by his will, which was proved there in 1823, gave several slaves, his land, and all his other property to his wife Lucy during her life. The will then proceeds thus: "after her death, my will is, that my negroes, Jub, Lid, Isaac, &c., be all emancipated, and continue under the care of Richard Harrison and John Pickett, as trusteees. It is further my will, that all my lands adjoining where I now live, with all the stock and plantation tools thereon, do continue in the care and under the protection of said trustees, for the benefit and support of said Jub, Lid and their increase forever. It is further my will, that all the balance of my estate, after my wife's death, belong to Cynthia Jones." The testator appointed his wife executrix, and she qualified and died shortly before this suit was brought. During her life, the defendant had some of the slaves in his possession in this state, and then took and sold them beyond the limits of the state. For doing so this action was brought, in order to recover damages, alleged to have arisen thereupon to Cynthia Jones, who is the intestate of the plaintiff.

The court was of opinian the plaintiff could not recover, and, in submission thereto he suffered a nonsuit and appealed.

Avery, *Landers* and *Thompson*, for the plaintiff.

Alexander, *J. G. Bynum* and *Craig*, for the defendant.

RUFFIN, C. J. Without considering the question, whether a general residuary clause vests in the legatee the legal remainder in slaves, specifically given to another for life, upon the assent of the executor to the legacy for life, the court holds this case to be against the plaintiff. For, suppossing the affirmative to be true ordinarily, it is not so upon this will. The residue in the slaves is not expressly given in that clause; but they are previously

disposed of otherwise. If they form a part of the residue at all, they fall into it by operation of law merely, contrary to the wish and expectation of the testator, upon the ground, that the disposition of them, for emancipation, failed by reason of its illegality. Now, that illegality is not established. It is possible, and, perhaps, probable, that it is deemed contrary to policy in South Carolina, to allow slaves to be emancipated and remain there, and the law of that state may not permit it. But, although we know that slavery is established in South Carolina, yet, without evidence, it cannot be judicially assumed here, that a bequest for emancipation is not valid there; since a power in the owner to manumit is not so absolutely incompatible with slavery, that they cannot co-exist under the same government; and, in fact, such a power, in some form or other, has been tolerated in most countries and in the states of this Union, in which that institution prevails. But, if that were otherwise, still the right of this residuary legatee would not be a legal, but an equitable one. For, it is plain, the testator meant, that either his personal representative, or the trustees nominated in the will, should perform the office of emancipating, or procuring the emancipation, of the slaves, if any further act were necessary to effect it; and to that end, the legal title must have been intended to revert to the personal representative, upon the death of the widow, or to vest in the trustees, with the land and other property, given "for the benefit" of the slaves. If the purpose of those gifts were illegal and could not be enforced nor executed, still the gifts themselves would not be avoided, but a trust would result to the residuary legatee, upon which there can be no action at law, but only a remedy in equity.

PER CURIAM. Judgment affirmed.

C. N. WHITE v. JOHN GIBSON.

The declaration of a partner, after the purchase of an article, that he had purchased it for and on account of the firm, is not, of itfelf, sufficient evidence to make his copartners liable.

The case of *Willis* v. *Hill*, 2 Dev. & Bat., 231, cited and approved.

Appeal from the Superior Court of Law of CABARRUS county, at the Spring Term, 1850, his Honor, Judge *Dick*, presiding.

Avery, *Landers* and *Osborne*, for the plaintiff.
Wilson and *Coleman*, for the defendant.

NASH, J. This action is in assumpsit, to recover from the defendant the price of a mule, purchased by one Lee, who is since dead, from the plaintiff, for the use of a firm consisting of said Lee and the defendant. The copartnership was admitted, and was entered into for the purchase and sale of negroes, horses, cotton and tobacco. To prove that the mule in question was purchased for the use of the firm, the declarations of Lee were admitted in evidence. These declarations were, that he had bought a mule from the plaintiff, and at a subsequent time, when the mule was brought home, he stated that he had bought it for the use of the firm. The latter declaration was objected to by the defendant and ruled out by the court.

The sole question now submitted is, as to the correctness of this opinion. It is a general rule of the law of evidence, that the acknowledgment of one joint contractor or partner, is evidence against all the rest, and sufficient to

bind them. The principle, upon which such evidence is admissible, is the community of interest between the party making the admissions and the party to be affected by them, and the presumption, that the former would not make an acknowledgment against his own interest. 2nd Star, on Ev., 26 and 583. If, therefore, it appears that it is the interest of the party, making the admission, to throw the burden of the contract on the firm, his acknowledgment cannot be received upon the well known rule, that interest in a cause will exclude a witness. The mule in this case was purchased by Lee, without, at the time, disclosing the fact (if it was so) that the contract was made for the firm. This conclusion necessarily results from other parts of the case. It is true, from the very constitution of a partnership, a presumption arises, that each partner is an authorized agent for the rest, in contracts relating to the subject matter of the partnership. But this relationship does not deprive either party of the liberty of making contracts for himself in similar matters. Thus, if A. and B. constitute a firm to merchandise goods, either of them, unless it is forbidden in the articles, is at liberty to enter into the same business, at the same place, on his own account. In this case, the first declaration of Lee is, that he has purchased the mule, without more. The legal presumption is, that when a person purchases a thing, he purchases it for himself. In such case, the vendor, in order to charge another person as a partner, must shew the purchase was made for the firm or that it went to their use. *Swann* v. *Heald*, 7 East., 209. Now, as before stated, from the case it appears, that Lee did not, at the time of the contract, mention the name of the defendant. The entire obligation of the contract, as far as this question is concerned, rested upon him. Shall he be permitted, by his own declaration, to throw upon the defendant a

burthen, which was originally his alone? In other words, has he not a direct interest in lessening his own responsibility? If so, the presumption, upon which the rule rests, as to the admission of the declaration of one partner to bind another, is taken away. This does not conflict with the principle, that each partner may by his act and declaration bind his copartner, in all transactions relative to the subject matter of the copartnership, but extends only to the evidence required to show that responsibility.

It is believed, the declarations of Lee were not competent evidence to prove the fact, for which they were offered.

PER CURIAM. Judgment affirmed.

ELIZABETH HENRY v. WILLIAM J. WILSON.

Where A. was entitled to a life estate in slaves, and, being threatened with a suit in equity to enjoin her from sending the negroes out of the state, in consideration that the suit should be forborne, agreed that the slaves should be placed in the possession of B., who was to pay her the hires annually and they were accordingly so placed in B.'s possession; *Held*, that A. thereby transferred all her legal interest to B., there being a sufficient consideration and an actual delivery of the slaves—that A. therefore could not support an action at law for them, but her only remedy, if B. failed to pay over the hires, was in equity.

Appeal from the Superior Court of Law of GASTON County, at the Fall Term, 1849, his Honor, Judge *Caldwell*, presiding.

Alexander, *Landers* and *Avery*, for the plaintiff.

Thompson, for the defendant.

PEARSON, J. This was detinue, for negro Amy and her two children, decided upon a case agreed, viz: Sarah McIntire in 1815 bequeathed the negro Amy to the plaintiff in these words: "I give to my niece, Elizabeth Henry, the services of my servant Amy, during her life, the said Amy to be liberated at her death, according to the laws of the state, provided the said Amy is well treated, but, if it can be made to appear, that she is not well treated, I allow my executor to take her and liberate her, or put her in the hands of some person, who will treat her well;" and in a subsequent clause of the will are these words, "I do hereby authorize and empower my executor to be the sole judge of the treatment, that the said Amy may receive in the possession of the said Elizabeth Henry." One Lot Cannon was appointed executor, was qualified and assented to the legacy, and put the negro in the possession of the plaintiff, who retained the possession of her and her children until 1843, when the said Cannon was about to file a bill in equity against the plaintiff, upon the ground that she intended to remove the negroes out of the state. Whereupon, to prevent litigation, the parties agreed to constitute the defendant their mutual agent and to put the negroes into his possession, with the understanding, that he would hold them during the life of the plaintiff and hire them out annually during that period, and pay the proceeds of their hire to the plaintiff, and, at her death, deliver them to the said Lot Cannon. Accordingly the negroes were put into the possession of the defendant, and he for several years hired them out and paid the money to the plaintiff. In 1845, the plaintiff demanded the negroes and commenced this action. His Honor in the court below was of opinion with the plaintiff, and judgment was entered in her favor, from which the defendant appealed.

We do not concur in this opinion. It admits of much

question, whether the plaintiff took a legal estate in the negro, and there is room to contend, that the whole legal estate continued in the executor, being necessary to enable him to execute the trust, in the event that the negro was not well treated; so that the plaintiff was only entitled to a trust or right to the services. But suppose the plaintiff took the legal estate for her life, leaving the reversion in the executor, we are of opinion, that she cannot maintain this action; because she parted with her title and it became vested in the defendant, in trust for her, so far as relates to the hires, during her lifetime, and then to be delivered to the executor, by force of the arrangement entered into between the executor and herself in the year 1843; the legal effect of which was, that, for a valuable consideration and forbearance to sue, she passed her estate to the defendant, in trust to pay her the annual hires; and this transfer, although without writing, was valid, as an executed contract, being a sale accompanied by an actual delivery. Thence she had no right to resume the possession, and has, in fact, no property in the slaves; her remedy, if the negroes are not annually hired out and the money paid to her, is by bill in equity, to enforce the performance of the trust.

The judgment below must be reversed and a judgment entered for the defendant.

PER CURIAM. The judgment reversed and judgment for the defendant.

DEN ON DEMISE OF ISAAC LYERLY v. CLAUDIUS B. WHEELER.

Where the lessor of the plaintiff in ejectment claims as purchaser at an execution sale, made under a judgment in which he was himself the plaintiff, he must shew the judgment as well as the execution—and if the sale was by execution under a decree in equity, he must not only shew the decree, but also the bill and answer, and so much of the pleadings and orders, as will shew, that the decree was pronounced in a cause properly constituted between the parties.

In an ejectment brought by a purchaser at a sheriff's sale against the defendant in the execution, the latter, while still in possession, cannot resist, upon the ground that he, the defendant, has a better title.

The cases of *Rutherford* v. *Raburn*, 10 Ire., 148; *Williamson* v. *Bedford*, 10 Ire., 198; *Thompson* v. *Hodges*, 3 Mur., 546, and *Islay* v. *Stewart*, 4 Dev. and Bat., 160, cited and approved.

Appeal from the Superior Court of Law of ROWAN County, at the Spring Term, 1850, his Honor, Judge *Dick*, presiding.

Craig, *Osborne* and *Alexander*, for the plaintiff.
Boyden, for the defendant.

NASH, J. Two questions are presented by this case to the consideration of the Court. The plaintiff claims title under a sheriff's deed, and, to establish it, offered in evidence a copy of a decree in equity made in the Supreme Court in his favor against the defendant. The introduction of this evidence was opposed by the defendant, for the reason that copies of the bill and answer, filed in the case, ought also to be in evidence. The court admitted the evidence. In this, we think, there was error.

The opinion of the court below was endeavored to be sustained here, upon the act of 1848, ch. 53, passed, as it declares, "to secure the title of purchasers of land sold under execution." It provides, that, "when lands had been sold or might be hereafter sold, by virtue of any writ of execution, &c., no variance between the execution and the judgment, whereon it issued, &c., shall invalidate the title of the purchaser." In the case of *Rutherford & Raburn*, 10 Ired., 148, the Court decided that the effect of that act is to restore the common law on that subject. By the common law, the execution not only justified the sheriff in acting under it, but the purchaser at the sale, in an action against the defendant in the execution, or one coming in under him after the lien attached, need not show the judgment. A contrary rule was established in this state by the case of *Hamilton & Adams*, 2 Mur., 161, and was considered the law until the passage of the act above mentioned. In *Raburn & Rutherford*, however, the Court restrained the operation of the act to cases, where the purchaser is not the plaintiff in the execution. When he is, he must shew a judgment, not to show that there is no variance between it and the execution, but that the plaintiff had a just claim against the defendant and it had been ascertained by a judgment—and to this, the case of *Lake* v. *Billers*, 1st Lord RAYMOND, is cited. If it was necessary, then, for the plaintiff to produce a copy of the decree in equity, which we hold to be the law in such a case, the copy of the decree alone will not answer. To make it evidence, it was necessary for him to have the bill and answer, and so much of the pleadings and orders, as would show, that the decree was pronounced in a cause properly constituted between the parties. *Williamson* v. *Bedford*, 10th Ire., 198. Another question was presented by the case, the decision of which is not necessary to the

disposition of the case at present, yet, as it must be presented to another jury, and may again arise, to save time and trouble, we proceed to give our opinion upon it. The defendant offered to prove, that, before the decree offered in evidence was obtained, he conveyed the land in dispute to one Locke in trust to secure his endorsers to a bank debt, which he owed, and that the said trustee on the 23d of November, 1846, had sold the premises at auction to one Nathan Chaffin, to whom he made a conveyance and who leased the land to him and under whom he now held it. This evidence was rejected by the court. In an ejectment brought by a purchaser at a sheriff's sale, against the defendant in the execution, the latter, while still in possession, cannot resist, upon the ground, that he, the defendant, has a better title.

The action of ejectment is to recover possession, and whatever possession the defendant in the execution had, the purchaser acquires by the sale and is entitled to recover. *Thompson* v. *Hodges*, 3 Mur., 546. *Islay* v. *Stewart*, 4 Dev. & Bat., 160. Our attention in the argument was called to *Marsh's case* in 9th Ir. This opinion is not in conflict with it. It was decided on its own peculiar features. The land had been sold under executions against the defendant for different persons, to one of whom he was considered as having surrendered the possession, and he took a new lease, after the last sale by the sheriff.

PER CURIAM. Judgment reversed and *venire de novo*.

JACOB BLEVINS v. WILLIAM BAKER, et al.

An officer, who has an execution against a tenant in common of chattels, may levy upon the undivided property and take it into his possession, for the purpose of selling the interest of the defendant in the execution; and he does not thereby subject himself to an action by the other tenant in common.

The cases of *Tredwell* v. *Rascoe*, 3 Dev., 50; *Wells* v. *Mitchell*, 1 Ire., 484, and *Islay* v. *Stewart*, 4 Dev. & Bat., 160, cited and approved.

Appeal from the Superior Court of Law of ASHE County, at the Fall Term, 1849, his Honor, Judge *Caldwell*, presiding.

Craig, for the plaintiff.
Boyden, for the defendants.

PEARSON, J. This was trover for 45 bushels of salt, a wagon and five horses, and a tent cloth, 5 pair of wagon gear, an axe, bucket, one coat and log chain. The plaintiff and one Peppers were tenants in common of the salt, which they had in a wagon. The wagon was stopped at the store of the defendant, Baker, the hind gate taken off and several sacks of salt delivered to Baker. At this time the defendant, Hunt, who, as constable, held several executions against Peppers in favor of Baker, was in the act of seizing and levying on the 45 bushels of salt. The plaintiff and Peppers attempted to prevent his doing so, by putting on the gate of the wagon and starting the horses; whereupon Hunt caught hold of the horses and kept them from moving, and, after much altercation, the plaintiff and Peppers went off and left the salt, wagon,

horses and everything appertaining thereto. The defendants took out the salt and put it in Baker's store house, and weighed off one-half, as the share of Peppers, which Hunt afterwards sold under his executions. The wagon belonged to Baker, he having hired it to the plaintiff to make the trip to the salt works; the horses belonged to persons in the neighborhood, who had hired them to the plaintiff. Baker kept his wagon, took the gear off the horses and turned them loose and they went to their respective owners. The tent cloth, gear, axe, bucket, coat, &c., belonged to the plaintiff. These articles the defendants did not remove or use or claim in any way. They remained where the plaintiff had left them; he could, without opposition, have taken them away at any time. It was not alleged, that the plaintiff wished or offered to resume the use of the wagon and horses after the salt had been taken out.

The court charged "that the defendants had no right to take possession, at all, of the salt, in the way they had done, by virtue of a levy on Peppers' interest, and the plaintiff had a right to sustain this action for such taking." On the second point, the court charged "that the plaintiff, having a general right to and possession of the tent cloth and gear and other articles, and a special right to and possession of the wagon and horses, had a right to recover, in this action, the actual damages which he had suffered by the interference of the defendants."

To this the defendants except. There was judgment for the plaintiff and an appeal.

We think, there is error in the charge upon both of the questions made. The interest of a partner in partnership effects may be sold under a *fi. fa.* for his individual debt. *Treadwell* v. *Rascoe*, 3 Dev., 50. The sheriff must of necessity seize, and take into his possession, the effects

levied on, in order to make the sale, and the other partner cannot maintain an action of any kind either against the officer, who levies and sells, or against the purchaser who takes possession. Indeed, it is held, that a partner cannot maintain an action of any kind against one, who purchases copartnership effects from a copartner, though such sale was made in fraud of the rights of the partnership and to satisfy the individual debts of such copartner. *Wells* v. *Mitchell*, 1 Ire., 484. Such being the law, in the case of partners, between whom the relation is more intimate, *a fortiori*, it is so in reference to mere tenants in common. The legal interest of a defendant in undivided chattels may be seized and sold under execution, *Islay* v. *Stewart*, 4 Dev. & Bat., 160, and the Court treat the question as too plain to call for authority. We know of "no principle which forbids a seizure and sale of a defendant's legal interest in undivided chattels." The officer must, of necessity, take possession of the whole, as it is undivided, and sell the right of the defendent in his execution, in the whole, and the purchaser becomes a tenant in common with the other part owner, and they must arrange the matter between themselves, as neither can maintain trespass, detinue or trover, unless the property is destroyed, (or as some say) sold.

Upon the second point, the construction ought to have been, that the evidence, if true, did not prove a conversion, either as to the tent cloth, gear and other articles, or of the wagon and horses. The defendant Hunt seized the horses, as a means necessary to enable him to complete his levy upon the salt. After he had seized the salt, the plaintiff might, without opposition, have taken the tent cloth, and everything to which he was entitled, if he had chosen to do so.

An officer may justify an entry upon the land of a third person, if necessary to enable him to levy on the property of the defendant in the execution. So it would seem, if

this action had been trespass for seizing the horses, the officer might have justified the act, as necessary to enable him to make the levy.

PER CURIAM. Judgment reversed and *venire de novo*.

JOHNSON LEDBETTER v. THOMAS J. TORNEY, et al.

A surety, who has paid money for his principal, cannot sue him in an action of *tort*.
The case of *Williamson* v. *Dickens*, 5th Ire., 259, cited and approved.

Appeal from the Superior Court of Law of McDOWELL County, at the Spring Term, 1850, his Honor, Judge *Caldwell* presiding.

This is a suit in *tort*, to recover from the defendants a certain sum of money, paid by the plaintiff to their use. The defendants, among other pleas, pleaded severally their certificate and discharge under the bankrupt law. On the trial it appeared, that the plaintiff became the surety of the defendants to one Logan for $2,100; that, on the defendants becoming insolvent, he was forced to pay the said debt with costs, and, thereupon, instituted this suit. The court was of opinion, that the plaintiff could not elect to sue in *tort* in this case; and, in deference to this opinion, the plaintiff submitted to a nonsuit and appealed.

J. Baxter, for the plaintiff.

J. G. Bynum, *Avery* and *N. W. Woodfin*, for the defendant.

PEARSON, J. The only question is, whether a surety, who has paid money for his principal, can declare in *tort*; so as to escape from the plea of a certificate in bankruptcy. The plaintiff's counsel was not able to shew any authority in support of his position, and it cannot be supported upon any fair reasoning upon the nature of the cause of action. In fact, if a surety is allowed his election to declare in *tort* or in contract, the landmarks, by which actions are distinguished, will be entirely obliterated; and the marked difference between actions *ex contractu* and actions *ex delicto*, will be lost sight of.

In *Williamson* v. *Dickens*, 5 Ire., 259, it is held, that, when a creditor has a claim, which he may enforce, either by an action of assumpsit or in *tort*, if he sues in *tort*, his action is not barred by a discharge in bankruptcy, and when an agent has failed to collect, or has collected and misapplied the funds, the principal may declare in contract or in *tort* at his election. So if a carrier or other bailee fails in the diligence required, he may be in contract or in *tort*.

Without undertaking to run out the dividing line between those cases, in which the plaintiff must declare in contract and those when he has his election to declare in contract or in *tort*, and to reconcile the cases, it is sufficient for us to say, that there is no authority nor reason for allowing the plaintiff in this case to declare in *tort*.

PER CURIAM. Judgment affirmed.

LEONARD SHOWN'S EX'RS. v. JOSEPH BARR, et al.

That the plaintiff, who sues as executor, is not an executor, is a plea in bar, and the defendant may plead it with any other bar.

The certificate of a presiding magistrate of a court of record in another state, which merely sets forth that A. B., who attests the transcript, was the clerk of that court, but does not declare that "his attestation is in due form of law," not being according to the Act of Congress, cannot be received in evidence.

Appeal from the Superior Court of Law of ASHE County, at the Spring Term, 1850, his Honor, Judge *Dick*, presiding.

The plaintiffs declare, as the executors of Leonard Shown, deceased, on a bond to their testator; and the pleas are *non est factum* and *ne ungues executor*. After proving the bond, the counsel for the plaintiffs insisted, that they were thereon entitled to a verdict, forasmuch as the plea of *non est factum* overruled the other plea. But the court held otherwise. Then, in support of the issue on the latter plea on their part, the plaintiffs offered in evidence a transcript of the proceedings in the county court of Johnson county in Tennessee, prior to this suit, purporting to be an order of the court, that letters testamentary issue to the plaintiffs, "who were appointed executors in Leonard Shown's will," and to state, that the plaintiffs took the oath, prescribed by law for executors. To it was annexed an attestation by Alfred T. Wilson, as clerk of the court, under his hand and seal of the court, and dated July 13th, 1847, setting forth,

"that the foregoing is a true transcript of the records of the said county court at August term, 1845." There was also annexed a certificate of "James King, chairman, &c," made July 13th, 1848, "that the within is a true copy of the record of this court at August term, 1845, and that it is taken in due form of law, and that Alfred T. Wilson was then acting clerk of the court, duly elected, and that the seal annexed is the seal of this court." Upon objection on the part of the defendants, that the transcript was not duly certified, the court rejected it; and the plaintiffs submitted to a nonsuit and appealed.

Craig, for the plaintiffs.

Thompson and *McCorkle*, for the defendants.

RUFFIN, C. J. The Court considers the decision on both points to be correct. That the plaintiff is not executor or administrator is a plea in bar. 3 Chit. Pl., 942. *Stokes* v. *Bate*, 5 B. & C., 491. Consequently, under the statute, the defendant was entitled to plead it with any other bar. Without noticing any objection to the judicial proceedings in Tennessee, as constituting letters testamentary, had the transcript been received in evidence, it is sufficient to say, that the objection, made at the trial, to its reception, is decisive. The Act of Congress requires, that the presiding magistrate of the court shall certify, that the person, who attests the transcript, is the clerk of the court, and that "the attestation is in due form;" instead of which, the certificate here is, that Wilson was then, in August, 1845, clerk—and it is utterly silent as to the attestation. As the transcript was not proved in any other manner, nor authenticated in conformity to the Act of Congress, it was properly rejected; and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

ISRAEL RICE v. JAMES CARTER'S ADM'R.

A. sold a tract of land to B. and gave him a bond for the title, and B., as the price of the land, promised verbally to pay one hundred dollars to C. to whom A. was indebted; *Held*, that this case does not fall under the 10th section of the statute of frauds, Rev. Stat. ch. 50, sec. 10 and 8, relating to promises to pay the debts of other persons, because the promise is to pay the debt of the very person, to whom the promise is made.

But in such a case the promise being verbal, comes within that provision of the 8th section, which provides that all contracts to sell or convey lands, &c., shall be void, unless such contract or some memorandum or note thereof be put in writing and signed by the party to be charged therewith, &c. Under this part of the section, the verbal promise was void.

The cases of *Miller* v. *Irvin*, 1 Dev. & Bat. 103, *Choate* v. *Wright*, 2 Dev., 289; *Carter* v. *Graves*, 2 Hawks 576, and *Smith* v. *Lewis*, 3 Hawks, 469, cited and approved.

Appeal from the Superior Court of Law of YANCEY County, at a Special Term in July, 1850, his Honor, Judge *Battle*, presiding.

J. W. Woodfin, for the plaintiff.

Gaither, with whom was *N. W. Woodfin*, for the defendant, submitted the following authorities:

Miller v. *Irvin*, Dev. & Bat., 1 vol., 103, and the references. *Wain* v. *Watters*, 5 East., 10, published in Smith's leading cases and the notes, 2 vol., 188.

PEARSON, J. This was assumpsit, upon a promise to pay one hundred dollars as the price of a tract of land. The plaintiff proved, that he sold to the defendant a tract of land, and executed to him a bond for title, to be made

when the purchase money was paid; whereupon, as the price of the land, the defendant promised to pay one hundred dollars to certain persons, to whom the plaintiff was indebted. The defendant relied on the statute of frauds—Rev. Stat., ch. 50, sec. 10 and 8. The 10th section provides, that "no action shall be brought to charge the defendant upon any special promise to answer the debt, default or miscarriage of another person, unless the agreement or some memorandum or note thereof be in writing."

The case does not fall under the operation of this section, for the promise is to pay the debt, not of another person, but of the *very person* to whom the promise is made, and it is well settled, that such a promise does not fall within the operation of this section of the statute.

The 8th section provides, that all contracts to sell or convey lands and slaves shall be void, unless such contract or some memorandum or note thereof be put in writing and signed by the party to be charged therewith, &c. The contract, in this case, was for the sale of land. The defendant signed no memorandum or note in writing, whereby he can be charged; and we are at a loss to see any ground, at all plausible, to support an action against him upon a mere verbal promise. *Lathroop* v. *Bryant*, 2 Bing., N. C., 744. The defendant had signed a written contract to convey land. The plaintiff (like the defendant in this case) had only made a verbal promise to pay the price, and it was urged for the defendant, that he ought not to be held liable under his written promise, inasmuch as the plaintiff was not bound by his verbal promise; but, said the Chief Justice, "whose fault was that? The defendant might have required the plaintiff's signature. The object of the statute was, to secure the defendant. In the argument, a little confusion has grown out of the fact of not distinguishing between the consideration of an agreement and the mutuality of claim. The defendant, for a sufficient

consideration, has bound himself in writing; whether the plaintiff is bound or not is not now the subject of enquiry." In this case, the construction of the statute was fully discussed. It is taken for granted, and as a thing not debatable, that the party, *who did not sign* the memorandum or note in writing, was not liable, and the idea of his being liable is not even suggested. In *Miller* v. *Irvin*, 1 Dev. & Bat., 103, it is held that the act of 1819, to make void parol contracts for the sale of land and slaves, does not require the consideration to be set forth in the writing. This is a departure from the English law, but we cannot see, that it has the least bearing upon the present question. So, in *Choate* v. *Wright*, 2 Dev., 289, and many cases following that decision, it is held, that this statute does not apply to executed contracts. We concur with these cases, but they have no bearing upon the present question. The contract here was not executed on either side and was purely executory. *Carter* v. *Graves*, 2 Haw., 576; *Smith* v. *Lewis*, 3 Hawk, 469, and several other cases for the price of land, where deeds had been executed, in which the payment of the purchase money was recited and a release given, all turned upon the question of estoppel, and the point is not made, whether the vendee was bound for the price without a promise in writing, because those were cases of executed contracts. The contract in the case now under consideration is *executory*, and comes within the words, as well as the meaning, of the statute, which was intended to prevent fraud and perjury, in relation to contracts for the sale of land and slaves.

PER CURIAM. Judgment reversed and *venire de novo*.

ROBERT POSTON v. ROBERT HENRY.

A recovery in ejectment will not support an action for the *mesne* profits, unless the lessor has regained the possession either by being put under process, or by being let in.

Where a recovery in ejectment is upon the demise of one of several lessors, neither another lessor in possession from not entitle the lessor, upon whose demise the recovery was effected, to an action for the *mesne* profits.

Appeal from the Superior Court of Law of BUNCOMBE County, at the Special Term in July, 1850, his Honor, Judge *Battle*, presiding.

The action is trespass for *mesne* profits. Plea, not guilty. On the trial the plaintiff gave in evidence the record of a recovery in ejectment. The declaration contained three counts, upon the several demises of George W. Jones, Rebecca Poston, and the present plaintiff, Robert Poston. It was served upon Evans, as the tenant in possession; but upon the affidavit of one Deaver and a motion in the name of the present defendant, he, Henry, was admitted a defendant and pleaded to the action. At the trial, the issue, on the demise of Robert Poston only, was submitted to the jury, and on it there was a verdict for the plaintiff, and judgment was entered thereon in July, 1848. In August, 1848, an *habere facias possessionem* issued, which recited the recovery of the premises by John Doe on the demise of Robert Poston, and commanded the sheriff to put the said party, plaintiff, or his agent, into sole possession, &c. Under it the sheriff put in George W. Jones in August, 1848, and this suit was brought about a month afterwards. Upon those facts, the counsel for the defendant took several exceptions; and among them was one, that the plaintiff could not maintain this action, because it did not appear that he had entered, after the

recovery in ejectment. It was overruled, and the plaintiff had a verdict and judgment, and the defendant appealed.

N. W. Woodfin, for the plaintiff.

J. Baxter, *Henry* and *Gaither*, for the defendant.

RUFFIN, C. J. The Court thinks the objection good. A recovery in ejectment will not support an action for *mesne* profits; for it is trespass for an injury to the possession, and, therefore it is necessary the plaintiff should shew, that he had regained the possession, either by being put in upon process, or let in. In this case, that is not shewn. We cannot conjecture, why the ejectment was tried as it was. But so it is, that the verdict and judgment are on the count on Robert Poston's demise, and the writ of possession accord swith them. In fact, however, Robert Poston has never been in under those proceedings; and, without further evidence of the connection between that person and Jones, the Court cannot presume that Jones was the agent of Poston to receive the possession. It is true, they were both lessors of the plaintiff in ejectment. But that was by seperate demises of the whole and imports several titles; so that it cannot be seen, that the possession of one of them is that of the other, and consequently the present action cannot be maintained, and it becomes unnecessary to consider the other points made.

PER CURIAM. Judgment reversed and *venire de novo*.

W. W. DAVIS v. WILLIAM T. COLEMAN, et al.

When A., a citizen of Georgia, being in this State, offered to lend to B. six thousand dollars, but on his return to Georgia, not having sold his cotton crop, wrote to B. that he could only lend three thousand dollars, whereupon B. went to Georgia, there received the money and executed his note for that amount; *Held*, that B. was bound to pay eight per cent., the interest according to the laws of Georgia.

Appeal from the Superior Court of Law of RUTHERFORD County, at the Fall Term, 1849, his Honor, Judge *Ellis*, presiding.

J. Baxter and *Bynum*, for the plaintiff.
Gaither and *Avery*, for the defendants.

PEARSON, J. This was debt upon a promissory note. The defendants relied upon the plea of usury. It was proven, that the plaintiff, who is a citizen of Georgia and has been in the habit, for many years, of spending his summers in this state at the springs, offered to lend one of the defendants six thousand dollars, the interest to be paid annually and satisfactory security to be given. This offer was made in Asheville. Afterwards the plaintiff, having returned to Georgia, wrote a letter to the defendant, William T. Coleman, informing him that he had not sold his cotton crop, as he had expected to have done, but would be able to accommodate him with three thousand dollars. Whereupon the defendant, Coleman, procured a note to be signed by himself and the other defendants, carried it to Augusta, Georgia, then filled it up, delivered it to the plaintiff, and received from him three thousand

dollars. Eight per cent. is the legal rate of interest in the state of Georgia.

The only question was, whether the contract was made in this state or in the state of Georgia, there being a difference in the rate of interest. The jury, under the instructions of the court, returned a verdict for the plaintiff, with eight per cent. interest, and from the judgment thereon, the defendant appealed.

We think it clear, that the contract was made and carried into effect in the state of Georgia, and must be governed by the law of that state. The chaffering or talk about the loan of money, which took place in this State, did not amount to a contract. If the plaintiff had refused to lend the money, the defendants would have had no cause of action against him ; nor would the plaintiff have had a cause of action against them, for failing to apply for the money. So, in fact, there was no definite contract made in this state, but a mere preliminary arrangement, having no force nor effect in legal contemplation, until consummated by the delivery of the note and the receipt of the money, all of which took place in the state of Georgia. We, therefore, concur in the opinion of his Honor, that the contract cannot be avoided upon the plea of usury, inasmuch as, although first spoken of and mentioned in this state, it was not, in fact, consummated, until the parties met in the state of Georgia ; and there was no evidence of any collusion or corrupt agreement to evade the law of this state.

PER CURIAM. Judgment affirmed.

MERCER FAIN v. A. S. EDWARDS, et al.

Where a witness for the plaintiff, on being examined as to a particular transaction, stated that he had paid a certain sum of money to the plaintiff, and the witness' credit was attacked and the transaction impeached for fraud; *Held*, that it was competent for the plaintiff to shew that he had entered the payment on his books at the time alleged.

Appeal from the Superior Court of Law of CHEROKEE County, at the Spring Term, 1850, his Honor, Judge *Caldwell*, presiding.

J. Baxter, for the plaintiff.
J. W. Woodfin, for the defendant.

NASH, J. The only question, presented for the consideration of this Court is as to the admissibility of testimony. The case shows that the defendant, Holcombe, had a judgment and execution against one Loudermilk. The execution was levied on the horse in question, claimed by the plaintiff and sold by the defendant. To prove his title, the plaintiff called Loudermilk, as a witness, who stated that he had sold or swapped another horse, belonging to the plaintiff, for the one in question. The difference in value between the two animals was thirty dollars, which he paid to the owner of the other horse, and the plaintiff gave him a credit on his book for that amount. The plaintiff was a merchant. The transaction between the plaintiff and witness was impeached on the ground of fraud. To corroborate the testimony of Loudermilk, the plaintiff offered

his book to prove, that he had entered the credit, as deposed to. There was a verdict for the defendant and from the judgment thereon the plaintiff appealed.

We think the court below erred in rejecting the evidence. As a general rule, it is admitted that a man cannot manufacture evidence for himself; but the evidence offered here does not touch upon it. For if the entry was made at the time it is alleged to have been, it was against the interest of the plaintiff, as it was an acknowledgment either of a subsisting debt due to Loudermilk or of a discharge from it. The fact, offered to be proved by the plaintiff, was not offered in chief, but in reply, to support the witness, whose veracity was impeached by the opposing party, and to rebut the imputation of fraud and want of consideration, by shewing that the credit was entered as he had stated. The effect of the evidence, if admitted, was another question, for another tribunal. If, instead of entering the credit on his book, the plaintiff had given the witness a receipt for it, or a note promising to pay it—would it not have been competent for him to sustain the credit of the witness, by shewing the one or the other? We think, unquestionably it would. If so, why is not the entry in the book evidence? We can see no difference in principle in these cases and the one under consideration, except that, in the present case, the evidence of the fact was in the custody of the plaintiff; in the others, in that of the witness. In deciding this question, we are bound to presume, that the plaintiff was prepared to prove everything, necessary to make the book evidence. Our attention is called to the single question, as to the admissibility of the entry, for the purpose for which it was tendered. We think his Honor erred in rejecting it. Evidence, which is not proper in chief, may become so in reply. Until a witness' testimony is impeached, the party producing him cannot shew, that he

has stated the same facts at a previous time. So neither in the case of a person, who is prosecuted for larceny, can the state shew that he is a man of bad character, until he has laid a foundation for the evidence, by attempting to shew his good character.

PER CURIAM. Judgment reversed and *venire de novo*.

HARVY D. CARRIER v. ADAM HAMPTON.

Where the subscribing witness to a deed for land or slaves and the maker are dead, or cannot be procured, whereby it cannot be acknowledged by the one nor proved by the other, recourse may be had to the common law mode of proof, for the purpose of registration, as for the purpose of making the deed evidence at common law generally.

In such a case the party would be under the necessity of giving similar evidence of the execution on the trial.

A mere mark or cross of an illiterate subscribing witness, *prima facie*, cannot be indentified, and therefore the instrument may be read upon proof of the handwriting of the party.

Where from the certificate of the probate of a deed, it only appeared that the witness swore, in general terms, that the signature of the party was in his handwriting, but he did not state upon what grounds he formed his opinion, nor by what means he had acquired a knowledge of the handwriting of the party; *Held*, that this evidence gave no authority to grant an order of probate.

Where the plea of fully administered is found in favor of the administrator, and, upon a *scire facias*, against the heirs, they come in and plead that the administrator has assets; *Held*, that upon the trial of the issue upon that plea, the heirs may give evidence of any assets received by the administrator, either before or after the trial of the original suit, and up to the time of the plea pleaded to the *scire facias*.

The cases of *Cutlar* v. *Spiller*, 2 Hay., 61; *Rhodes* v. *Holmes*, 2 Hawks., 193; *Horton* v. *Hagley*, 1 Hawks., 48; *McKinder* v. *Littlejohn*, 1 Ire., 66; *Jones* v. *Blount*, 1 Hay., 238; *Pope* v. *Askew*, 1 Ire., 17; *Miller* v. *Spencer*, 2 Mur., 281, and *Martin* v. *Harding*, 3 Ire. Eq., 603, cited and approved.

CARRIER *v.* HAMPTON.

Appeal from the Superior Court of Law of McDOWELL County, at the Fall Term, 1849, his Honor, Judge *Ellis*, presiding.

This action was commenced in October, 1843, and is trover for slaves, which the defendant claims under a bill of sale from his father, Jonathan Hampton, the intestate of the plaintiff. On the trial of not guilty pleaded, the plaintiff produced, as witnesses, two other sons of the intestate, who executed to the plaintiff releases for their respective distributive shares of the personal estate and effects of their deceased father, and to whom, also, the plaintiff executed several releases for any claim for the costs of suit. The defendant still objected to their competency, upon the following grounds, which they stated on their *voire dire*. Certain creditors of the intestate instituted actions against the plaintiff, for debts of the intestate, in which he pleaded "fully administered" and no assets, which were found for him: and the creditors took verdicts, ascertaining their demands and signed judgments therefor, according to the statute, and then issued writs of *fieri facias* against the witnesses and the other heirs, to have execution against the real estate, in which the heirs had not yet pleaded, but the same were still pending. Upon the death of their father, lands descended from him to the witnesses, and, after the expiration of two years from his death, the witnesses respectively sold and conveyed their shares: the one, without, and the other with, general warranty. The court was of opinion, that upon the collateral issue, which the witnesses might have, the questions of fully administered and no assets extended only to the truth of the administrator's plea, when the same was pleaded, and therefore, that the interests of the witnesses could not be affected by the result of this suit, and they were received and permitted to give evidence, that the intestate had the slaves in his possession and use and claimed them as his own up to

his death, which occurred several years after the date of the alleged bill of sale to the defendant, and, also, that, during that period, the defendant did not claim them.

The defendant then produced his bill of sale, which purported to be attested by one Edmund Tomberlin, as the subscribing witness, who did not write his name, but made his mark in the form of a cross, in the manner usual with illiterate persons: and, having proved that the said Tomberlin was dead, the defendant moved to give the deed in evidence upon the probate and registration thereof. The probate was before a judge of the superior court on the 6th of July, 1846; and he certified, "that Jefferson S. Hampton, being duly sworn, testified that Edmund Tomberlin, the subscribing witness to the within written bill of sale, is dead, and that the signature of Jonathan Hampton, the grantor therein, is in the proper handwriting of the said grantor;" and, thereon, it was ordered to be registered: upon objection by the plaintiff, the court refused to admit the instrument in evidence. After a verdict and judgment for the plaintiff, the defendant appealed.

J. G. Bynum and *N. W. Woodfin*, for the plaintiff.
Avery, *G. W. Baxter* and *J. Baxter*, for the defendant.

RUFFIN, C. J. The deed to the defendant was, the Court thinks, properly excluded. As creditors and purchasers are not parties to the controversy, but only those who are party and privy to the instrument, the old cases would have allowed it to be proved on the trial, as a conveyance at common law and read, without reference to its attestation, probate and registration, under the acts of 1784, 1789 and 1792. *Cutlar* v. *Spiller*, 2 Hay., 61. *Rhodes* v. *Holmes*, 2 Hawks., 193. But the Court does not further consider that point, as it was not raised on the trial, and the defendant insisted, on the contrary, that

he was entitled, under the statute, to read the deed on the probate and registration appearing on it, without further proof of its execution. Rev. Stat., ch. 37, sec. 21. But that depends upon the question, whether there has been that due probate and registration, which the act meant, and the Court is of opinion, there has not. The case that occurred is not expressly provided for in the act. But there is no hesitation in holding, that a deed for land and slaves would not be avoided by the accidental circumstance of the death of the subscribing witness and of the maker, whereby it could not be registered upon proof by the one or acknowledgment by the other. In such a case, we hold that recourse may be had to the common law mode of proof for the purpose of registration, as for the purpose of making the deed evidence at common law generally. But it would follow, that, in such cases, the party would be under the necessity of giving similar evidence of the execution on the trial, since it is clear, that the provision of the act, which dispenses with the subscribing witness upon the trial, and admits the deed on its probate and registration, supposes the probate and registration, thus received, to have been upon the evidence of that witness or the acknowledgment of the party or in some other way specified by the statute. In the present case no such proof was offered on the trial: nor, in the opinion of the Court, was proper and sufficient evidence given, to authorize the order for registration. The case of *Horton* v. *Hagley*, 1 Hawks., 48, shows that point to be open, when the instrument is offered to support a title and the defect of the evidence appears in the probate itself. The Court does not concur in one of the objections taken to the probate by the counsel for the plaintiff, that there ought to have been proof of the mark being in the hand of the witness, or at the least, affirmative evidence, that the defendant endeavored and failed to get proof to the mark, as being that of the witness.

For, although in some very extraordinary instances, the mark of an illiterate person may become so well known, as to be susceptible of proof, like handwriting, yet, generally, a mark, a mere cross, cannot be identified, and, therefore, *prima facie*, it stands *per se* upon the same reason with the case, in which the party, after due enquiry, has been unable to prove the signature of the person, who, upon the face of the instrument appears to have written his name as subscribing witness—in which case, the instrument may be read upon proof of the handwriting of the party. *McKinder* v. *Littlejohn*, 1st Ire., 66; *Jones* v. *Blount*, 1st Hay., 238. But the other objection, that the proof of the grantor's handwriting was defective, and, so, did not authorize the order for registration, the court deems well founded. The witness deposed in general terms, that the signature of Jonathan Hampton was in the handwriting of that person; but he did not state, upon what grounds he formed his opinion, nor by what means he had acquired a knowledge of the handwriting of the party; and consequently it does not appear that his means of information were such, as to render his opinion admissible. *Pope* v. *Askew*, 1 Ire., 17; *Jackson* v. *Waldron*, 13 Wend., 178. Upon the other point, as to the competency of the sons of the intestate, the opinion of the Court differs from that of his Honor. It is true, the creditor, who sued the administrator, could not, in any proceeding of his own, directly against the administrator, either in law or in equity, reach personal assets subsequently received by the administrator. *Miller* v. *Spencer*, 2 Mur., 281; *Martin* v. *Harding*, 3 Ire. Eq., 603. But that arises from the forms of the pleadings and judgment, and the conclusiveness, belonging to the adjudication of all tribunals, upon matters within their jurisdiction, when the same matters come up a second time between the same parties. But the same operation is not given to a judgment against third persons generally; and

the statute enacts in the particular case of creditor, executor and heir, that execution may go against the estate of the heir upon a judgment in a suit against the executor, provided the executor has fully administered or hath not personal assets; and it enacts further, that at the election of the heir, a finding in the first suit of fully administered and want of assets shall not bind the heir nor even the creditor, and enables the heir, on the *scire facias* of the creditor, to take a new issue upon the question of assets with the executor, who is kept in court for that purpose. That is a collateral issue, and the creditor stands by, awaiting the result, for the sake of the right of the other parties, as between themselves; for the law supposes the creditor is to be paid, at all events, by the one side or the other, whichever has the estate of the debtor, that is then chargeable; and to that end, if the issue be found against the executor, it gives the creditor execution *de bonis testatoris et de bonis propriis.* It is apparent, that, through the rights of the heir, the creditor may thus have satisfaction from the personal estate or the executor, when, of himself, he could not get at either. Although those provisions of the law, were, doubtless, designed chiefly, if not entirely, for the protection of the heir, yet, the creditor also derives, incidentally, a benefit from them. That benefit and protection are necessarily co-extensive; and as far as the heir can shew assets in the hands of the executor, the creditor is turned over to him and the land of the heir is, *pro tanto*, exonerated. That was admitted in the argument to be true, in respect to such personal assets, as the heir may shew the executor to have been liable for, at the time the executor pleaded originally; making the issue between the heir and the executor relate back to that between the creditor and the executor. But, as the Court conceives, that limits the issue too straitly, and is opposed to both the words and the reason of the law. As the heir has no interest in the

question of assets, save only to protect his own inheritance, it is to be presumed from his tendering an issue, that he has real assets, and therefore, that the creditor will obtain satisfaction, at least, to some extent. If, then, the collateral issue relates to the executor's plea, the consequence would be, that the heir's land might be sold under the judgment, while the executor had ample assets, received, indeed, after he had pleaded or after judgment in the action against him. That, unquestionably, is contrary to the policy of the law, and, we think, the construction of the statute. The law does not mean the land of the heir to be taken upon judgment on a *scire facias*, if there be personal assets, with which the debt ought to be discharged, at time payment is demanded of the heir; for, the very purpose is to save the land of the heir, and it ought to be done, if practicable, and without reference to the ability or inability of the executor to pay the debt at any previous period, provided he then have the means. If the heir and the next of kin or legatee, entitled to the personalty, be the same person, the law could never intend, that the executor, upon a technical rule of pleading, affecting him and the creditor, should be enabled to withhold the personal estate belonging to this person as next of kin and thereby deprive him of his inheritance. If, on the contrary, different persons fill those characters, it is manifestly unjust, that the property of one should be taken to pay the debt of the other; and, that, too, when it may be conveniently ascertained, in a pending proceeding, out of which property of the two, it ought to be paid. It is true, indeed, that this enquiry cannot be brought down to the day of trial, but, by the forms of judicial proceedings, is stopped by the tender of the issue by the heir. Up to that time, however, the purposes of the law require, that the heir shall be allowed to call the executor to account. Hence the statute is, not only that "the heir shall be at liberty to con-

test the truth of the finding of the issue in favor of the executor," but he may thus contest its truth by a "plea, that the executor *hath* sufficient assets or *hath* wasted the same." It was, therefore, erroneous to suppose, that the issue is as to the truth of the administrator's plea, that he then had no assets. In reality, however, that distinction is not material to the question of the competency of the heir, as a witness, for his ancestor's administrator, in a suit for property alleged to belong to the intestate; for, unquestionably, the heir would be entitled to satisfaction out of the personalty, no matter when received, for money raised by legal process out of his land, although the creditor to whom the money was paid had lost his remedy against the executor. However it may be, between the creditor and the personal estate, that estate must certainly exonerate the real estate or reimburse to it all sums, which it was compelled to pay to creditors, and it is a common equity to give relief in such cases. Therefore although the witness might not be able to charge the administrator upon a collateral issue with these slaves, as they have never been in his possession, and he has, hitherto, been unable to recover them, yet, if he should hereafter do so, they can insist on the return thereout of the money, raised out of their land or paid by them in respect of it, and, therefore, it is not competent to them to give evidence, that the property was in their ancestor. The releases, given by them, make no difference, as they give up only their distributive shares as next of kin, and their right, which we have been considering, is as heirs-at-law, and distinct from the other. Neither is their liability or recourse ever affected by their sales of the land; for, the statute makes them answerable for debts, as the land itself would have been, to the value of it, and without any regard to the sale being with or without warranty.

PER CURIAM. Judgment reversed and *venire de novo*.

JOHN C. WATTERS and wife v. GEORGE W. SMOOT.

Where a man has charged a woman with incontinence with a particular individual, he cannot, on the trial of an action for this slander, go into evidence to shew that she was incontinent with other persons.

The declarations of the husband, who is necessarily a party to the suit for slander of his wife, are admissible in evidence to shew her guilt.

The case of *Snow* v. *Witcher*, 9 Ire., 346, cited and approved.

Appeal from the Superior Court of Law of WILKES County, at the Fall Term, 1849, his Honor, Judge *Caldwell*, presiding.

Boyden, for the plaintiffs.
H. C. Jones, for the defendant.

PEARSON, J. This was a case for slanderous words, spoken of the plaintiff, Mrs. Watters.

The words charged the plaintiff with criminal intercourse with one Nelson Haggins. In support of his plea of justification, the defendant offered no proof in reference to Haggins, but offered to prove that Mrs. Watters had had criminal intercourse with other men, and the plaintiff, her husband, had on several occasions said, she was guilty of such intercourse with men, other than Haggins. This testimony was objected to, but was received. There was a verdict for the defendant, and from the judgment thereon, the plaintiffs appealed.

The question is, where the words make a charge of incontinence with a particular individual, can the plea of justification be supported by proof of criminal intercourse with other men? or must the defendant make good

his plea, by proof of such intercourse with the individual named? A charge, that the plaintiff stole the hog of A., is not supported by proving that he stole the hog of B. When the charge is general, as that the plaintiff is guilty of larceny or of counterfeiting, the plea sets out some particular act of larceny or of counterfeiting, so as to make the issue certain; and, in this case, the defendant has the advantage of being able to put his defense upon any particular act of the kind, which he thinks he can prove. But when the charge is *particular*, and the defendant, at the time he speaks the words, selects a specified offence, he is bound by it, and his plea must rest on that particular matter. This is obviously right, because, having, for the sake of giving point and force to his charge, gone into particulars, and having had the advantage of thereby making his accusation the more plausible, he has no right to complain, that he is not allowed to make a departure, and run over the plaintiff's whole life, to see "if there be no shame in it." This is a well settled distinction in slander, and we see no reason to find fault with it.

The statute, which gives the present action, provides, that it shall he prosecuted "under the same rules and regulations, as have been heretofore observed in the trials of actions of slander;" and we are not at liberty, if we were so disposed, to give defendants in this action any greater latitude, than they are entitled to in the common law action.

Our attention was called, in the argument, *Snow* v. *Witcher*, 9 Ire., 346. There is nothing in that case, opposed to our present decision. Then the charge was general. The defendant had selected no individual with whom he had connected the plaintiff, and the substance of that case is, that conception and delivery did not make

a part of the charge, and for that reason need not be proven. It was enough for the defendant, by his plea, to aver, that the plaintiff had had criminal intercourse with the witness. But here the charge is *particular*. The defendant, at the time he spoke the words, selected Nelson Haggins as the man, and he cannot be allowed in his plea, to shift his ground.

The declarations of the husband ought also to have been rejected, because he did not allude to Haggins. We do not concur in the other reason suggested, that his wife ought not to be affected by his declarations. He is a party of record, is bound for the costs, entitled to the recovery, and could not be examined as a witness. The influence, that such declarations ought to have, is for the jury.

PER CURIAM. Judgment reversed and *venire de novo*.

MARIA C. FEATHERSTON v. WILLIAM FEATHERSTON.

Where there is a contract for the sale of a slave, and the question was, whether it was the intention of the parties that the contract was to be considered executed or only executory, the Court cannot decide that question, but must leave it to the jury.

The cases of *Henry* v. *Patrick*, 1 Dev. & Bat., 358, and *Caldwell* v. *Smith*, 4 Dev. & Bat., 67, cited and approved.

Appeal from the Superior Court of Law of HENDERSON County, at the Spring Term, 1850, his Honor, Judge *Caldwell*, presiding.

This is a suit in trover, to recover the value of a negro boy, named John. The plaintiff relied on the deposition of one Hawkins to shew title. It is in the following

words: "That in July, 1844, he, Robert, Hawkins was in Henderson county, N. C., about dividing the property of Berryman Featherston, deceased, and the said M. C. Featherston and William Featherston were both there, and a division of the negroes took place, and, in the said division, a negro boy named John, aged about three years, fell in a lot to William Featherston, after which the said William Featherston traded him to M. C. Featherston for two hundred dollars, it being the amount that the said boy was valued at to the said William Featherston. The trade took place on Saturday some time in July, 1844, and he saw M. C. Featherston pay William Featherston between fifteen and twenty dollars in silver, and the said M. C. Featherston offered to give her note for the balance due and demanded a bill of sale, and they agreed to draw the writings on the Monday following, and the trade being made and assented to by the parties, William Featherston delivered the said negro boy John to M. C. Featherston, with that understanding, that they would draw the writings on the Monday following." The plaintiff lived with her mother and owned other slaves, and her mother owned the mother of John; and it was a matter of contest on the trial, in whose possession John was, up to the time, when the defendant in some way got possession of him, some two years after the trade. It did not appear that any bill of sale had ever been executed, but there was evidence, which tended to shew, that a note had been executed by the plaintiff to the defendant for some purpose. A witness testified that he knew of no dealings between the parties. It was insisted for the defendant, that, supposing Hawkins' testimony to be true, it was an executory contract, and no title passed. The court was of opinion, that it was an executed contract, according to the

said Hawkins' testimony, and that a title to the boy John passed to the plaintiff, and so charged the jury. A verdict was rendered for the plaintiff, and from the judgment thereon the defendant appealed.

Gaither, for the plaintiff, submitted the following authorities:

Bateman v. *Bateman*, 2 Dev., 97; *Choate* v. *Wright*, 2 Dev., 389; *Mushat* v. *Brevard*, 4 Dev., 73; *Eppes* v. *McLemore*, 3 Dev., 345.

N. W. Woodfin and *Baxter*, for the defendant.

NASH, J. When his Honor, the presiding judge, pronounced his opinion in this case, he entirely overlooked those of *Henry and Patrick*, 1st Dev. & Bat., 358, and *Caldwell and Smith.*, 4 Dev. & Bat., 67, or drew a distinction in principle, between them and the present case, which the facts do not warrant. In the first case, the defendant sold to the plaintiff a negro; the price was agreed upon and the boy delivered. The value was to be paid in a bond, which the plaintiff then held upon the defendant. The bond not being present, it was agreed, that, in a few days, the defendant would call at the plaintiff's house, execute a bill of sale and receive the bond. The plaintiff took the boy home with him. The contest between the parties there, as here, was, whether the contract was an executed, or executory one, to be completed by the executing of the bill of sale by the defendant and the delivery of the bond by the plaintiff. The court decided, that it was a question of fact for the jury, as to the intention of the parties, and not one of law. The court could not decide upon the intent. This case governs the one before us; the only fact differing the latter is, that, at the time, a small part of the purchase money was paid by

the plaintiff. This, we think, makes no material difference between the cases, in principle. Property in slaves can be passed in two ways; either by sale and delivery or by deed. Here the parties, at the time the terms of the contract were agreed on, agreed that the note for the balance of the purchase money and the bill of sale were to be executed and delivered at a subsequent day. Was the boy John, then, delivered, at the time, as the property of the plaintiff, under the parol contract, and the bill of sale to be given as further assurance or evidence of title? If so, the contract was complete. If the boy was put into her possession, but not as her property, until a bill of sale was executed and a bond or note for the residue of the purchase money was delivered, and it was the understanding of the parties, that the title should not be changed, until those things were done, then the contract was not completed by the delivery of John and the payment of a part of the purchase money. Which was the intention of the parties, was a question of fact for the jury to ascertain. We think his Honor erred, not in the conclusion, which he drew from the facts—upon that we have no right to express an opinion—but that he assumed the jurisdiction of the jury, in drawing any conclusion, as a matter of law.

PER CURIAM. Judgment reversed and *venire de novo*.

DEN ON DEMISE OF JOSEPH BROOKS, et al. v. BENJAMIN RATCLIFF.

Where the land of a debtor has been sold by execution and an action is brought against him to recover possession, he has no right to object that the sheriff has not made the deed to the purchasers at the execution sale, since the sheriff may convey to an assignee, whether he be an assignee by law or by contract.

In cases of verdicts, subject to the opinion of the court, all the points, on which either party means to insist, ought to be reserved, for all points not reserved are taken to be given up. If one of the parties cannot have inserted a question, on which the presiding judge inclines against him, he ought not to consent to a verdict, but peremptorily claim that an opinion shall then be given to a jury, as he has a right to do.

Where an action was brought in the name of James Brooks, William E. Colton and William E. Churchill, partners trading under the name and firm of "Brooks, Colton and company," and the judgment was in the name of Brooks, Colton & Co.; *Held*, that this was a variance, for which the judgment might have been reversed at common law, but the error was cured by our statute of amendments, Rev. Stat., ch. 3, sec. 5.

A purchaser of land at an execution sale gets a good title, although the sale was made on a Tuesday or Wednesday of the week, on the Monday of which the writ was returnable, but was not returned.

A deed, after reciting a sale of land by execution, proceeds thus: "In consideration, &c., the said P. R., sheriff, &c., doth hereby bargain, sell, alien, enfeoff, convey and confirm *with* the said James T. Brooks, &c., their heirs and assigns, &c., to have and hold the same *to* the said. &c., their heirs and assigns;" *Held*, that the use of the word *with* does not affect the sense or operation of the instrument; as, upon the context, it is evident, between or with whom the contract is, and by and to whom the estate is conveyed.

The cases of *Testerman* v. *Poe*, 2 Dev. & Bat., 103; *Wall* v. *Jarrott*, 3 Ire., 42; *Barnard* v. *Etheridge*, 4 Dev., 295; *Gibson* v. *Partee*, 2 Dev. & Bat., 530; *Pope* v. *Bradley*, 3 Hawks., 16; *Lanier* v. *Stowe*, 1 Hawks., 229, and *Mordecai* v. *Speight*, 3 Dev., 428, cited and approved.

Appeal from the Superior Court of Law of BUNCOMBE County, at the Special Term in February, 1850, his Honor, Judge *Caldwell*, presiding.

The lessors of the plaintiff set up a title, by virtue of a sheriff's sale under a judgment and execution against the defendant, Ratcliff. By the transcript of the record it appeared that the action was debt by James S. Brooks, William E. Colton, and William E. Churchill, partners trading under the name and firm of "Brooks, Colton and Company," upon a bond given by the defendant to "Brooks, Colton & Co." and that a *fieri facias* was issued thereon, running also in the name of "Brooks, Colton & Co.," by virtue of which the sale was made, under which the plaintiff claims. For that variance or defect, the counsel for the defendant insisted, he was entitled to a verdict; but the court held otherwise. The plaintiff then gave in evidence the return of the sheriff on the execution, that on the 4th of October, 1843, he sold the premises to the plaintiffs in the said execution, and also a deed from the sheriff, dated September 18th, 1846, to James S. Brooks, William E. Churchill and William M. Colton and Eli Colton, in which is recited the levy of the execution and the sale of the premises to James S. Brooks, William E. Colton and William E. Churchill, copartners under the firm of Brooks, Colton & Co., and that, afterwards, the said William E. Colton died and left surviving him the said William M. Colton and Eli Colton, who were the only children and heirs-at-law of the said William E. Colton, deceased; and then the premises are conveyed therein to the said four persons, James S. Brooks, William E. Churchill and William M. Colton and Eli Colton, in fee. After those recitals and stating the price bid and the payment thereof, the deed proceeds thus: "In consideration, &c., the said P. R., sheriff, &c., doth hereby bargain and sell, alien, enfeeoff, convey and confirm *with* the said James S. Brooks, &c., their heirs and assigns all, &c., to have and to hold the same *to* the said, &c., their heirs and assigns." By reason of an alleged defect in the deed in using the word "with" instead of "to" in the conveying

part, the counsel for the defendant insisted, that it did not pass the title to the lessors of the plaintiff. But the court held to the contrary. The defendant then called, as a witness, the sheriff, who made the sale; and he deposed that he did not sell on the first Monday of October, 1843, (which was the return day of the execution,) but that, at the request of the defendant, he postponed the sale from Monday until Tuesday and again from Tuesday to Wednesday of that week, and that on this last day the sale was made. The counsel for the defendant, thereupon insisted, that if that testimony was true, the said sale was void; but the court held, that it was, nevertheless, valid. The counsel for the defendant, thereupon, excepted to the opinions of the court upon those several points. The counsel for the defendant then insisted, that, forasmuch as there was no evidence, besides the recitals in the sheriff's deed, that William E. Colton had died or that William M. Colton and Eli Colton were his heirs, the plaintiff could not recover.

The court gave no opinion thereon to the jury, but, by the request of the counsel in the cause, the point was reserved; and thereupon a verdict was taken for the plaintiff, subject to be set aside and a nonsuit entered, if the court should be of opinion on that point for the defendant; otherwise, judgment to be entered on the verdict. Afterwards, the court set the verdict aside and ordered a nonsuit, and the plaintiff appealed, and then the defendant appealed also.

N. W. Woodfin and *J. G. Bynum*, for the plaintiff.
J. Baxter and *Gaither*, for the defendant.

RUFFIN, C. J. Upon the point reserved, the case of *Testerman* v. *Poe*, 2 Dev. & Bat., 103, and those referred to in it, are direct authorities against the judgment. The sheriff may rightfully convey to the assignee of the pur-

chaser, and it is not material, whether he be assignee by contract or by law. But, in truth, that is a matter with which the debtor in the execution has no concern ; it being altogether between the sheriff, the bidder and the alleged assignee. In this case, indeed, the acquiescence by the sheriff and two of the partnership, which purchased the land, jointly with two persons purporting to claim as the children and heirs of the other partner, furnishes a presumption of the existence of those facts ; since, otherwise, it would be against the interest of the supposed survivors thus to take the deed. But our opinion does not go on that ground alone, nor, even, chiefly. It proceeds on the broader one, that the objection is not one, which the defendant has a right to raise. It was, therefore, erroneous to set aside the verdict, and there ought to have been judgment on it for the plaintiff, according to the agreement of the counsel. Consequently, that judgment must now be given here.

It will be thus perceived, that the defendant has precluded himself from taking advantage of any error, which might have been committed in ruling the other points against him. For, although, a plaintiff may, doubtless, appeal from a judgment for him, if it be, for example, for less than he was entitled to, yet we do not see, how a defendant can bring a writ of error or appeal upon a judgment in his favor, since it is of no consequence to him upon what ground he is discharged. In cases, therefore, of verdicts, subject to the opinion of the court, all the points on which the party means to insist, ought to be reserved. If one of the parties cannot have that done, in respect to a question, on which the presiding judge inclines against him, he ought not to consent to such a verdict, but peremptorily claim, that an opinion shall then be given to to the jury, as he has a right to do. By consenting that the judgment shall depend on this or that particular question, all others are necessarily taken to be

given up. These observations are made to prevent an oversight of the kind in future; for it so happens, that in the present case, the opinion of this Court concurs on each point with that given against the defendant in the superior court, and therefore, he suffers no prejudice from the manner in which the case was brought up.

There is no variance between the judgment and execution; both being in the name of the firm of "Brooks, Colton & Co." There is no doubt such error in the judgment would have been cause for reversing it at common law. But the statute of amendment cures it by the provision, that no judgment shall be reversed for any mistake in the name of any party or person, when the correct name has been once rightly alleged in any of the pleadings or proceedings. Rev. Stat., ch. 3, sec. 35. *Wall & Holton* v. *Jarrott*, 3 Ire., 42. If the judgment could not be reversed, the execution which conforms to it, must, of course, be supported. It is said, indeed, that there was no judgment rendered in the action of debt. But we must hold to the contrary. First, that objection was not taken on the trial: If it had been, it would have been untenable, as we have had many cases, in which it was held, that although the judgment be not formally entered, yet, that, upon a verdict, which, connected with the pleadings, authorized a judgment, one shall be intended and the minutes be taken for the judgment, if a formal entry could be made up from them. *Barnard* v. *Etheridge*, 4 Dev., 295. *Gibson* v. *Partee*, 2 Dev. & Bat., 530. The courts, being aware of the indulgence, which counsel and attornies extend to each other upon these parts of their duty, are obliged to admit such inducements, in support of rights derived under judicial proceedings.

The act, which requires sales to be made at the court house on the same Monday of each month, on which the court of the county sits, expressly authorizes the sheriff to

postpone the sale from day to day, for any of the reasons mentioned in the act; and it has been held, that in respect to the postponement of the sale, the act is directory, and, therefore, that the purchaser is not bound to see that the officer complied with his duty in that respect, any more than in duly advertising, or selling all the personalty before offering the land. Hence a purchaser on Tuesday or Wednesday gets a good title; and it is settled that he does so, although his purchase be on those days of the week, on the Monday of which the writ was returnable, but was not retained. *Pope* v. *Bradley*, 3 Hawks., 16; *Lanier* v. *Stone*, 1st Hawks., 229; *Mordecai* v. *Speight*, 3 Dev., 428.

Upon the remaining point, as to the effect of the use of the word "*with*," in the conveying clause of the deed, the Court is of opinion, that it is an inacuracy, which does not affect the sense or operation of the instrument, as upon the context, it is evident, between whom or with whom the contract is, and by and to whom the estate is conveyed. On the whole case, therefore, the judgment must be reversed; and, the Court, proceeding to give such judgment as the superior court ought to have given, the verdict must be reinstated and judgment rendered thereon for the plaintiff, in conformity to the agreement between the parties.

PER CURIAM. Judgment reversed and judgment for the plaintiff.

DEN ON DEMISE OF JAMES GIBSON v. FREDERIC WALKER.

A man, being bound to maintain and support his father, conveyed a tract of land to his brother in trust to perform the conditions of that bond in the first place, and then out of the proceeds of the land to pay the other creditors of the maker of the deed. In the deed was contained the following clause: "The manner of executing the deed, as to the support of my father," is left to the discretion of the maker of the deed; *Held*, that this did not make the deed, on its face, fraudulent in law, for it reserved to the maker no control over the fund, but only the manner, in which the father should be supported.

The fact, that the debt to the father was prospective, as well as immediate, does not make it illegal to give it the preference.

The cases of *Moore* v. *Collins*, 3 Dev., 126; *Hafner* v. *Erwin*, 1 Ire., 490, and *Cannon* v. *Peebles*, 2 Ire., 449, cited and approved.

Appeal from the Superior Court of Law of ROWAN County, at the Fall Term, 1849, his Honor, Judge *Caldwell*, presiding.

H. C. Jones, for the plaintiff.
Boyden, for the defendant.

NASH, J. In 1825, William Gibson, James Gibson Hugh Gibson and John Gibson, executed to their father, Joseph Gibson, a written obligation, in the penalty of five hundred dollars each. The condition set forth that the parties are "the sons and heirs of Joseph Gibson," and having received, and expecting to receive, titles to the whole of the land of said Joseph, bind themselves to discharge all the debts of their father, then due or to be afterwards contracted, and to maintain him during his natural life, and to bury him decently. In 184[illegible], John Gibson conveyed to his brother James, the lessor of the plaintiff and who was one of the parties to the contract of 1825, the tract of land in dispute, subject to the following condition and proviso: "The condition of the above obligation is such, that, whereas the said John Gibson is bound by

bond, in the sum of five hundred dollars dated the 29th of April, 1825, together with William Gibson, James Gibson and Hugh Gibson, in a like sum for the support of Joseph Gibson, their father, during his lifetime. Now, therefore, the condition of this deed is, that the said James Gibson shall well and truly do and perform the covenants and contracts contained in the said bond, by maintaining and supporting the said Joseph during his life, and by burying him in a decent manner, &c., and also, that the said James shall out of the proceeds, &c., pay certain debts therein enumerated." The deed then provides, but it is understood and agreed, "that the support and maintenance of my father is to have the preference of all other of these claims. After this is performed, the debts of these other creditors are to be paid by the sale of said land, in such manner as will make the said land bring the most money. The manner of executing the deed, as to the support of my father, is left to his, said John's, option and discretion. The surplus, after the above trusts are performed, is subject to my order." At the time the deed of trust was executed, John Gibson, the grantor, was indebted, was sued and judgment obtained, and a *fi. fa.* issued, and was levied on the land in dispute, and, at the sale, the defendant became the purchaser, and this action is brought by the trustee to recover the possession. His Honor, the presiding judge, ruled that the deed of trust, upon its face, was fraudulent and void, as against then existing creditors of John Gibson, and that, therefore, the plaintiff could not recover in this action. The plaintiff then submitted to a nonsuit and appealed.

We are not informed upon what provision in the deed, his Honor's opinion rested. It is necessary, therefore, to examine it in all its parts. Does the first provision for the support of Joseph Gibson, the father, make it so?

John Gibson was indebted to his father in the sum of five hundred dollars for his maintenance—his father was, therefore, a creditor, and it was as much the intention of the deed of John in conveying his land, to secure that debt as any other—nor does the fact of his giving that debt the preference over the other debts, and postponing them until its discharge, render the deed, in law, fraudulent. So far the deed of trust presents the ordinary case of a debtor making an assignment of property for the payment of his debts, and classifying the claims or designating the order in which they are to be paid: This is not illegal. *Moore* v. *Collins*, 3d Dev., 126; *Hafner* v. *Erwin*, 1st Ire., 490. The debt to the father existed from 1825, and is, by the maker of the trust, placed in the first class. Does the fact, that the debt to the father is prospective as well as immediate, make it illegal to give it the preference? Surely not. A man may secure a future or contingent debt as well as a present one. Take this case: a man, considerably in debt, procures a note to be discounted in bank with a view to pay his creditors; in order to procure sureties, he is required to mortgage real estate to secure them: now whether he will ever pay that debt or his sureties be called on to pay it, is contingent, and depends upon the fact of his failure to pay the necessary instalments. This contingency, however, cannot make the security void in law. But, again, a man, who owes debts, purchases a tract of land, and gives to the vendor a lien upon it for the purchase money, either by mortgage or trust—this does not make the latter void in law. The maker of the trust or mortgagor does nothing the law condemns. This feature in the deed of trust did not make it, in law, fraudulent. *Cannon* v. *Peebles*, 2d Ire., 449. Our attention in the argument was drawn to the last clause, but one, in the deed of trust, "to-wit," the *manner* of executing the deed,

as to the support of my father, is left "to his, said John's, option and discretion." This reserves to John no control whatever over the fund conveyed, but only the manner in which the father shall be supported. Several persons were so bound, and the maker of the trust intended not to leave that to the arbitrary control of the trustee, but, as to the manner of the support, to reserve it, to be arranged between him and his brothers, as that he should board with the one or the other, and *that his* contribution should be in money or specific articles. It is true, that when the maker of a deed of trust to secure his creditors, reserves to himself the power of revoking it, and declaring other trusts, whereby an interest or benefit may accrue to himself, the conveyance is fraudulent and void; but this is not such a case. The last clause is, "the surplus after paying all the debts is to be returned to the maker." This provision is only putting in words what equity would declare "to-wit," a resulting trust for the maker after the debts are all paid. The deed of trust is not, upon its face, fraudulent—but it was a proper matter of enquiry for the jury to say, whether it was the intention of the maker of it to defraud his creditors or any creditor, in the collection of these debts, contrary to the provisions of the act of the General Assembly.

PER CURIAM. Judgment reversed and *venire de novo.*

WILFORD TURNER v. ANDREW BEGGARLY, et al.

Where a note or bond is assigned after it is due, the assignee holds it subject to all the set-offs and payments to which it was subject in the hands of the payee.

Otherwise, when the note or bond is assigned before it is due, unless the payments are endorsed on the instrument.

The case of *Haywood* v. *McNair*, 3 Dev., 231, and 2 Dev. & Bat., 283, cited and approved.

Appeal from the Superior Court of Law of IREDELL County, at the Fall Term, 1849, his Honor, Judge *Caldwell*, presiding.

The defendant, Beggarly, gave to Isham Gaither his bond for $173.50, dated February 19th, 1847, and payable at twelve months. On the 29th of July, 1847, Gaither deposited the bond with the plaintiff, and they executed an agreement in writing, that it was so deposited "to make the said Turner safe for the amount said Gaither is due him and also as his surety in all cases; and whenever said Gaither shall pay said Turner and release him as the surety of said Gaither, the above bond is to be said Gaither's, and, otherwise, to be the said Turner's." On the 1st of October, 1847, Gaither endorsed the bond to the plaintiff and, soon after it fell due, this action of debt was brought on it, and the defendant pleaded payment, and the set-off of certain sums, which Gaither owed to him, Beggarly. In support of those pleas, the defendant offered to give in evidence the following notes made by Gaither: One dated in 1846 and payable to Beggarly one day after date; another dated September 1st, 1847, and payable to Beggarly, one day after date; one payable to one Gray, September 2nd, 1846, and endorsed by Gray to Beggarly,

July 19th, 1847. The counsel for the plaintiff objected to receiving them in evidence, but the court admitted them. Evidence was then given on the part of the defendant, that, shortly after giving the bond which is sued on, the plaintiff applied to the defendant to take up certain debts, which Gaither—then and during the year 1849, in the defendant's employment at wages of $26 a month—owed to the plaintiff, which the defendant refused, telling the plaintiff "the thing is nearly up;" and also that, between the 7th and 12th of September, 1847, the defendant applied to the plaintiff to let him see the bond and the written agreement of the 29th of July, 1847, in his possession, and that the plaintiff then shewed them to the defendant, asking him if he wished to pay the bond, and the defendant replied, "I am ready to pay according to my contract with Gaither, and it is about paid off to Gaither."

The court instructed the jury, that, although the bond was assigned to the plaintiff before it was due, it was liable to all defenses by the obligor, which he could set up against the obligee, provided the plaintiff had notice of those defenses at the time of the assignment, or such information as would put a prudent man upon enquiry; and, therefore, that in this case, if they believed that Turner had such information, they should allow, as set-offs, all the debts to the defendant up to the 1st of October, 1847. The counsel for the defendant then moved the court to instruct the jury, that the defendant was not entitled to claim, as a set-off, any of the said debts, which arose to the defendant after he had notice of the deposit of his bond with the plaintiff, upon the agreement of the 29th of July, 1847. But the court refused, and then told the jury, that the deposit and separate written transfer made no difference, whether the defendant knew of them or not, and that, up to October 1st, 1847, the plaintiff stood in Gaither's shoes, provided he had notice of the

alleged payments and set-offs. The jury thereon found payments for $152.29, and that, after deducting the same, a balance of $21.21 was due for principal money on the bond declared on, and assessed the damages for interest to $2. After judgment the plaintiff appealed.

Osborne and *Thompson*, for the plaintiff.

Craig and *Boyden*, for the defendant.

RUFFIN, C. J. Notes over-due are deemed dishonored, and, one, who takes them in that state, is considered, at this day, as taking them upon the credit of his endorser, and is to stand in the place of the holders at or since its maturity. It is commonly said in such a case, that the bill or note is affected in the hands of the endorsee by all the equities between the original parties. That form of expression is proper and strictly true, in relation to such defenses as the maker could set up in a court of equity against the payee, for, whenever the debtor, in the view of the court of equity, ought to be relieved from the payment of the debt, either because of some original vice in the contract or because of a counter-demand, or other sufficient reason, it is against conscience in the holder of a security of this kind, to attempt to defeat the debtor of the benefit of such an equitable defense, by making an assignment of it. Therefore, an assignee after maturity is, in equity, held to take the note, as his assignor had it. But, if the defenses of the debtor be equitable in their nature, that is, cognizable in the court of equity and not in a court of law, as between the original parties, the jurisdiction is not changed in respect of such defenses by the fact of the security being endorsed. It is true, the same form of expression, that an over-due note is liable after endorsement to all equities, is often used in courts of law, and in books, which treat of the legal rights of the assignee and debtor. But, it is not in reference to the legal rights of

those parties, an accurate mode of speaking, for, as Chief Justice HENDERSON said in *Haywood* v. *McNair*, 3 Dev., 231, "The equities of the parties which attach to a contract of this kind, can no more be examined in a court of law, than any other equities. Therefore, defenses founded on mere equities must be made in equity; and the law takes notice only of such defences as are of a legal nature. The meaning then, of thus speaking in a court of law is, that a note, transferred under dishonor, is subject to the legal exceptions to its payment in the hands of the assignee, to which it was liable in the hands of the payee." Accordingly, in that case, the Court declined entering into mere equities between the parties, but held the defendant entitled to the same legal defenses against the note in the hands of Haywood, to which it was subject in the hands of Barnes at the time of the assignment by him to Haywood. Upon the strength of the case of *Burrough* v. *Moss*, 10 B. & C., 558, just then reported in this country, a second action was brought by Haywood, and the questions before decided were re-examined by the Court, and the opinions before given were again affirmed. It was held, that if the debtor had a right to a deduction or set-off against the plaintiff, at the time of the assignment, he should, although the set-off or deduction did not attach to the particular note or bond, have the same right after the assignment, and that he might have the benefit of such right upon the general issue, if sued in assumpsit or by special plea, if sued in debt on a bond: but that the defense, thus set up, must be one for the original debtor, if sued by the obligee at law, and not one which would be merely a ground for relief in equity. *Haywood* v. *McNair*, 2d Dev. & Bat., 283. The utmost extent, then, to which, at law, this doctrine, that an assignee is affected by the liabilities of his assignor, has been carried, is, that he shall be thus affected in respect of such liabilities, as existed at the time

of the assignment and constituted a demand, which was then available, as a defense at law. The proposition, thus stated, obviously excluded from its operation, notes and bonds endorsed before due. There may be a few cases of bills, perhaps, which might be admitted as exceptions; as if a bill were noted for non-acceptance, and then wrongfully endorsed by one, who held it for the benefit of the drawer or the like; then the instrument carries its dishonor on its face, though not due; but in respect to notes or bonds, not at maturity, it is not seen, how any defenses arising out of counter-demands between the original parties can be let in. They were not available at the time of the assignment. Indeed, in *Burbridge* v. *Manners*, 3d Camp., 192, Lord ELLENBOROUGH, admitting that payment at maturity extinguished a bill or note and that it could not be reissued, declared distinctly, that payment meant a payment in due course, and not in anticipation, and therefore that a subsequent assignee for value before a majority could recover on the security. For, as Mr. Justice BUTLER said in *Brown* v. *Davis*, 3 T. R., 80, a transfer of a note, before it is due, carries no suspicion with it, and the assignee receives it on its intrinsic credit; and, as Mr. Chitty adds, he is not bound to enquire into circumstances, existing between his assignor and any of the previous parties to the paper, as he will not be affected by them. Chitty on Bills, 14 Story's Edit., 1819. It would clog in an inconvenient and dangerous manner the circulation of negotiable paper, if such prepayments could affect its validity, when left in existence, with no note of the fact on it; much less can it be affected by a counter-demand of the maker or the payee—at least at law. Under what form of pleading could the defense be presented? There was clearly no payment here. It is not a set-off of a debt against the indorseee; nor a set off of a debt of the assignor,

available at the time of the assignment, since at that time there could be no action by any one on the assigned instrument. If there were any equities, which tied up the hands of the payee from justly parting from the paper, another tribunal may give relief against the assignee on the ground of them, if they can be brought home to him; as if he had agreed to apply these demands to the debt; then being insolvent, endorsed it with notice. But in such a case, on the other hand, a court of equity would not confine its enquiry to the effect of the legal assignment, by endorsement, but would have regard to an assignment, as a security or by a separate agreement in any form, which constitutes a contract of assignment in that court. We do not propose, however, entering into those considerations, taking notice of them only to show, that they present points peculiarly belonging to the court of equity and which cannot be acted on at law, without danger of doing injustice to one or both of the parties. Here, the plaintiff took the bond by endorsement, at a time when the defendant could make no defense against it, and it was not questioned on the trial, that he gave value for it and holds it for himself. It is impossible for juries duly to estimate the circumstances, which ought to put a person on enquiry, and thus affect him with notice of a counter-demand or other equity, and the attempt to do so would often work great injustice. It is safest, therefore, to rely upon the broad distinction, founded upon the time of transfer, that is, before and after the maturity of the paper—in the latter case, allowing to the debtor all the defenses he could have had against the obligee, if sued at law by him; but in the former, passing the paper effectually at law, according to its tenor in its face or memorandum on it, and leaving the debtor to such relief in equity, as by the rules of that court affect the conscience of the assignee.

PEARSON, J. I think there was error in both of the grounds, assumed as the basis of the decision, in the court below.

There was error in the legal effect given to the agreement, as to the mode in which the note was to be paid. That agreement did not have the effect of a payment, or any other legal defense; it was a confidence in trust, or understanding, that the debtor should be at liberty, when the note became due, to make payment in such debts or demands against the creditor, as the former should pay off for the latter: it was a trust or agreement, which equity would prevent the creditor from defeating, and to which, it would subject a purchaser, who acquired the legal title, provided his conscience could be affected by proof of notice; in the same way, as one, who takes the legal estate in land from a trustee, is required to perform the trust, provided he had notice, on the ground that he was *particeps criminis* in the breach of trust. But this is a principle which does not obtain at law. There, the legal title prevails, and, under the statute, the plaintiff in this case became the legal owner by the endorsement.

I confess, it is difficult for me to conceive, how there can be a payment or any legal defense (other than such as avoids it *ab initio*) to a debt, before it is due; but make the supposition, there was also error in the idea, that, in a court of law, it was admissible to show, that the endorsee had notice before the endorsement, and upon the ground of such notice, defeat his legal title. A court of equity assumes, that the title passes, and the remedy proceeds on the ground, that the purchaser or endorsee, should be declared a trustee, by reason of his being affected with notice. This mode of giving relief never has been attempted in a court of law.

If money be accepted, as a payment, before the note falls due, and it is endorsed as such on the note, the legal effect is, to extinguish the note to that amount; its existence only continues as to the balance due, which is all that can pass by the endorsement. The effect is the same, as if the first note had been cancelled and a new note given; in other words, when payments are endorsed, the endorsee takes the note in its "then state and condition," and acquires title only to such part, as in law has an existence.

But if money be accepted as a payment before the note falls due, its legal effect is not to operate as a payment, so as to make an extinguishment to that amount. It is a mere agreement, trust or confidence; that it *shall be applied* as a payment, when the debt is due; it is a thing not done, but only agreed to be done, and, if the note is endorsed, the whole legal title passes, and the party can only have relief by commuting the purchaser into a trustee. A contrary rule would subvert the whole system of the negotiability of notes, which it has been the policy of our statutes to extend.

The doctrine, in reference to notes endorsed after maturity, is fully discussed and settled in *Haywood* v. *McNair*, 3 Dev., 231,—same case, 2 Dev. & Bat., 283, and in the opinion of the Chief Justice in this case, in which I fully concur.

PER CURIAM. Judgment reversed and *venire de novo*.

JOHN W. FOSTER v. NICHOLAS W. WOODFIN.

Where a man has conveyed a personal chattel, but still retains the possession his acts and declarations, even subsequent to such conveyance, while he continues in possession, are evidence against the vendee or grantee, on a question of fraud.

Where a man makes an absolute conveyance of a chattel, purporting to be either a sale or a gift, and continues for a long time in the possession of the chattel, so purported to be conveyed, this creates, in law, a strong presumption, on which the jury should find the conveyance fraudulent, as against creditors, unless opposing and explanatory circumstances should rebut the presmuption.

Fraud is never, exclusively, a question of fact, that is, in the sense of leaving it to the uncertain judgment of jurors to give to the intent to convey upon a secret trust, or to the fact of credit being given to the grantor, upon his continuing in possession, such effect as to them, in each case, may seem proper, but, on the contrary, the effect of such an intent or false credit, if in fact existing, depends upon the fixed principles of the law.

The cases of *Askew* v. *Reynolds*, 1 Dev. & Bat., 367, and *Gregory* v. *Perkins*, 4 Dev., 50, cited and approved.

Appeal from the Superior Court of Law of BUNCOMBE County, at the Special Term in February, 1850, his Honor, Judge *Caldwell*, presiding.

This is trover for a slave, Lucinda, and her children, and was tried on the general issue. Both parties claimed under one Benjamin Ratcliff: the defendant as a purchaser at a sale under execution, and the plaintiff, under a conveyance to his wife, who was a daughter of Ratcliff. The question was, whether the deed to the daughter was *bona fide*, or fraudulent against the father's creditors.

The plaintiff produced the bill of sale to his wife, dated in March, 1835, and proved its execution by the sub-

scribing witness, who was a son of Benjamin Ratcliff. It purported to have been made in consideration of $400 then paid, and was proved and registered in July, 1847. The witness further deposed, that no money was paid, and that no person was present at the time, but the members of the family; and that the father said, that he made the deed with a view to a division of his slaves among his children. Further to support the issue on his part, the plaintiff produced as a witness the said Benjamin Ratcliff; and he deposed, that he executed the said bill of sale at the time it bears date, and then delivered it and the said slave, Lucinda, to his daughter, who was then married to "the plaintiff and lived about a mile from the witness; that the said Lucinda was then about six years old, and was not sold by him, but was intended as a gift to his daughter, and that she was not taken away by the daughter, but left by her to wait upon her mother, the wife of the witness, who was then sickly: That, at that time he owned a negro man and three other negro girls, two of whom were older than Lucinda, and also owned a tract of land of the value of $2,000, a wagon and team and other stock, and did not owe as much as fifty dollars; and that there was no fraud in his gift to his daughter: That in 1838 and 1839, he became involved in debt as surety for the subscribing witness to the deed and another son: That therefor the judgments were obtained, under which the defendant purchased, and that in 1839 and in 1840, he conveyed all his property to his children: That he continued in possession of said Lucinda up to 1843: and that, in that year, the plaintiff hired her to James Ratcliff, a son of the witness, who lived with him, and they worked the plantation on which the witness resided: and that, during that year, the sheriff came to his house with executions on

the said judgment, to levy on that slave and the others, and they were kept out of the way there about a week, and then Lucinda went into the possession of the plaintiff, who also kept her out of the way of the sheriff, and held her until she was taken under the executions in 1847, and that during that period she had the two children."

On the part of the defendant, the judgments and executions, under which he purchased, were produced: and evidence was further given by several persons, that they had long resided near Ratcliff and the plaintiff, and that Ratcliff paid the taxes on the said Lucinda and claimed her as his own, until the sheriff endeavored to levy on her in 1843, and that they were in the habit of conversing with him about his property, and, before that time, had never heard, from him nor from any other person, of a conveyance or transfer of Lucinda to the plaintiff's wife. The defendant then offered to prove by a witness, that in 1842, a son of the said Ratcliff applied to the witness on behalf of his father to become his surety for an appeal from the county to the superior court upon one of the said judgments, and informed the witness, that as a security to him, his father said, he would execute a deed of trust for his negroes: that he, the witness, declined doing so, but went with the son to the said Ratcliff's house, and there, the father asked the son "whether he, the witness, had agreed to go into the arrangement," and the son replied thereto, "he had not," and that then the said Ratcliff, the father, said to the witness, "there is no danger." The testimony thus offered was objected to on the part of the plaintiff, but was admitted.

In summing up the case to the jury, the presiding judge instructed them, that when a person makes such a conveyance of a negro, as that made by Ratcliff in this case, and then continues in possession for eight years, using and claiming the slave as his own, there is such a repugnance between the transfer and possession as raises a presump-

tion of a secret trust for the donor, which is fraudulent, and also that, unless such possession be accounted for satisfactorily to the jury, the impression of fraud remains on the transaction: and then left it to the jury to say how far that presumption of fraud was repelled in this case. The counsel for the plaintiff then moved the court further to instruct the jury, that, if the testimony of the witness, Benjamin Ratcliff, was believed by them, they ought to find for the plaintiff, and the instruction was given as asked.

The jury found for the defendant and the plaintiff appealed from the judgment.

Gaither and *J. Baxter*, for the plaintiff.

J. G. Bynum and *Avery*, for the defendant.

RUFFIN, C. J. The objection to the evidence is not well founded. The acts and declarations of the father, while in possession of the slave, as to the nature of his possession and claim of title, are evidence on those points, though they occurred after his conveyance to his daughter. *Askew* v. *Reynolds*, 1 Dev. & Bat., 367. Whether the statement of the son to the witness was competent or not, depends upon the question, whether the son was the father's agent to enter into the arrangement, as it was called, with the witness, or induce the witness to become the surety for the appeal upon the security of the negro Lucinda, and the other negroes. Upon that point it is very clear from the father's language to his son and the witness, upon seeing them, that the son had been sent by the father to the witness upon some agency or with some proposal; and, although not constituting direct or full proof of any agency, to the extent of engaging for the conveyance of these slaves by the father, yet it is equally clear that those acts and declarations of the son and father were evidence tending to shew such an authority in the son.

They were, therefore, fit to be received and submitted to the jury for their consideration on that point. Indeed, coupled with the other evidence, that the father claimed and used the negroes as his own for so long a period, both before and after that date, the evidence raised a strong presumption that the son had authority from the father, to make the witness the proposal he did; for, to what else did he allude, when he spoke of "the arrangement" and said "there was no danger in it?"

Of the instructions to the jury, the plaintiff, in the opinion of the Court, has no cause to complain. They are, of course, to be understood in reference to the facts of the case. They are, that a conveyance of a negro child of six years of age, supposing its date to be true, was made by a father to a daughter living within a mile of him, without any valuable consideration, though purporting to be for the large price of $400, and was followed by the continued possession of the father for eight years afterwards, and by his contracting large debts and making voluntary conveyances to his children of all his other property, in three or four years after its execution, the father, during that period, using and claiming and offering to convey the negro as his own, and the conveyance to the daughter being, for the whole eight years, not only unregistered, but concealed, so as to be unknown to the nearest neighbors and most intimate friends. Certainly, under those facts, the transaction is presented to our consideration in a most questionable shape, and a strong presumption of fact arises, that it was not fair but merely colourable, and, therefore, ought not to stand in prejudice to the debts contracted by the father on the faith of that property. That was not seriously resisted in the argument, but it was said that the presumption was purely one of fact, and therefore that it was the province of the jury, exclusively, to consider of its weight, and it was erroneous in his Honor to make any observations on it. But

that is not the law, as it seems to the Court. There have been so many cases in this state, involving this doctrine, and it has been so frequently and so fully discussed here, as to make it unnecessary now to look beyond our own decisions for authority on it. As was said in *Gregory* v. *Perkins*, 4 Dev., 50, fraud is never, exclusively, a question of fact, that is, in the sense of leaving it to the uncertain judgment of jurors to give to the intent to convey upon a secret trust, or to the fact of credit being given to a grantor, upon his continuing in possession, such effect as to them in each case may seem proper, but that, on the contrary, the effect of such an intent or false credit, if in fact existing, depends upon the fixed principles of the law. It is true, that, in respect to the consequences of a grantor continuing in possession of a chattel, it was observed in that case, that, contrary to the rule as once laid down in England, we held, that it did not, *per se*, conclusively establish covin in the conveyance, but was to be left to the jury as matter of evidence. Yet it was further observed, that it was to be left to them "as a ground of presumption," that there was a secret trust or that the parties had a view to a false credit of the vendor, which would be more or less strong under all the circumstances of the parties, the subject, length of possession, and the notoriety of the title of the vendee and of its acquisition." And it was explicitly stated, that a conveyance by an owner in trust for himself, or his possession after an absolute conveyance, with a view to contract debts, on the credit of the property, of which such possession is "a ground of presumption," is in law fraudulent. In the subsequent case of *Askew* v. *Reynolds* already cited, the opinion of the Court is again given very distinctly to the same effect. After noticing the old rule, that the possession of a donor, after an absolute transfer of a chattel, established the fraudulent intent, so as to render any further enquiry as to its existence unavailing, the judgment of the Court proceeds to set

forth how far it had been modified. It states, that the doctrine had been so far overruled, as to allow explanations to be made to repel the inference of the unlawful intent. Still it was declared, that the repugnance between the transfer and the possession was such, as yet raised the presumption of a secret trust for the benefit of the grantor; which, while it admits, also requires, an explanation, and which, unexplained or not satisfactorily explained, establishes the fraud. And, in applying the principle to the case then under consideration, the Court said, that a possession for eight or nine months, after making the conveyance, was sufficient to impress upon the transaction the character of a fraudulent transfer, unless from other facts and circumstances, another character could be clearly assigned to it. It is useless to quote other cases, as what fell from the Court in those referred to plainly shews, that in such a case, it is deemed a reasonable and legal presumption, upon the grounds mentioned, that the conveyance and possession by the donor were fraudulent, open, indeed, to proof, or to inferences from other circumstances to the contrary. The very ground of admitting the evidence of such possession, as relevant to the question of fraud, is, that it tends to establish and raises a presumption, that the conveyance was not *bona fide*, according to its purport, and that the possession was calculated to deceive those who dealt with the possessor; and it would seem impossible, that it can be wrong to lay such ground before the jury, so as to enable them to perceive the more clearly the reasonable force of the presumption and the effect properly to be allowed to opposing and explanatory evidence. The instructions in the present case did nothing more than that. In truth they stated the presumption under consideration, its force and effect and its susceptibility of being rebutted, substantially as laid down and much in the same language used by this Court in *Askew* v. *Reynolds*. It was, how-

ever, contended at the bar, that, since that case, the law had been altered by the 4th section of the act of 1840, ch. 28. But that is clearly a mistake; the only provision of that section is, that a gift by one indebted at the time is not absolutely void as against his creditors, by reason merely of such indebtedness, without regard to the sufficiency of the property reserved by the donor for the satisfaction of his debts; the affirmative of which had before been held to be law (whether the donor or the donee had the possession) upon the ground that the donor could not honestly give away his property to the defeating of his creditors. But that is, altogether, a different species of fraud from that here imputed and depends upon different facts and considerations; and the law touching this case is entirely unaffected by the statute. His Honor, therefore, was fully authorized by previous adjudications to lay the principle down to the jury as he did. Indeed, he went further on behalf of the plaintiff, than was strictly proper, in saying that the testimony of Ratcliff, the father, repelled the presumption of fraud, and, if believed, entitled the plaintiff to recover. It is true, that the witness denied there was a trust for himself, simply by saying, that a gift to his daughter was intended and that there was no fraud in the gift. But he failed entirely to account for the secrecy of the conveyance and its concealment for eight years, for the falsehood in setting forth the consideration in the deed, and for his long subsequent possession and apparent ownership of the other property, which, he admitted, he conveyed to his other children, whereby he was able to get credit to the value of all of it and perhaps more. Upon all those material points, he deposed to nothing, saving only, that he kept the negro —then six years old—to wait on his wife, who was sickly at that time. But that circumstance does not remove those grave grounds of suspicion and presumption of fraud, since he did not state that his wife continued to

need or to have the girl as a nurse—a very poor one truly—or even that she lived through those eight years or any considerable portion of them. For the probable, and, in this case, the actual, deception of the persons, with whom he contracted debts, arising from his possession of the slave, and not only the apparent, but the claimed, property in her for such a length of time and from the omission of the plaintiff, for that period, to assert a title under the conveyance to his wife or to let its existence be known, the witness furnishes no reason or excuse whatever, but leaves the presumption raised by such deception to operate unimpeded. It is quite certain, therefore, that the plaintiff had all the advantage in the charge, which he could claim, and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

THOMAS M. YOUNG v. MARTIN BOOE, et al.

When a deed of trust for the payment of debts conveys a cotton factory, &c., and in the deed are provisions, that the maker of the deed shall retain possession for eleven months, and during that time his family may be supported out of the proceeds of the factory; *Held*, that these provisions did not make the deed fraudulent in law, upon its face, but, as the provisions might have been for the benefit of the creditors, as well as of the debtor, the question of fraudulent intent was one, upon which the jury must decide under all the circumstances.

Appeal from the Superior Court of Law of DAVIE County, at the Spring Term, 1850, his Honor, Judge *Dick*, presiding.

This action is trover for a parcel of blacksmith's tools, and the plea "not guilty." The plaintiff claims under a deed of trust made to him by Thomas McNeily, on the 2d of February, 1849, and registered the same day. The deed conveyed to the plaintiff a piece of ground near Mocksville, containing 16 acres, known as the factory lot, on which are situated, the cotton factory building and other outbuildings, together with the steam engine, grist mill, three wool carding machines, and all the cotton machinery, consisting of four cotton cards, pickers, drawing frames, two speeders, one card grinder, four frames containing 504 spindles, four reels, one banding machine, one yarn press and all the battins, one turning lathe with all its tools, and a variety of other tools, all the raw cotton on hand, and all the factory wood on hand: also a lot adjoining, containing one acre: also another lot, on which there is a blacksmith's shop, with all the smith's tools and one new wagon partly ironed: one house and lot, wherein McNeily resided, and his store house and lot, and all his household and kitchen furniture and library, and three horses and another wagon and gear, four head of cattle, all his corn, wheat, oats, hay, and fodder and four slaves; and the deed further assigned to the plaintiff all debts owing to McNeily by bond, note, account or otherwise, and all other property whatsoever, whether real or personal, to which the grantor was in any wise entitled: Upon trust, that the whole or such parts of the property, should remain undisposed of, on the 1st day of January, 1850, should, after due notice, be sold by Young at public auction to the highest bidder upon a limited credit, and that, in the meanwhile, any part of the property might be sold at private sale, should a reasonable price be offered: and that, until such public sale, McNeily should remain in possession and management of the property, as the agent of the trustee, and might also make private sales thereof as aforesaid, and that he should, "as

early as practicable," make out a complete list of all the judgments, bonds, notes and other debts of every description belonging to him, for the said Young; and that, out of the proceeds of such sales and with the sums collected on the debts, all necessary expenses of executing the trusts should first be paid by the said Young, and then certain enumerated debts, for which persons were bound as sureties; and thirdly, certain other debts specified, and also all others, which the said McNeily then owed, whether particularly mentioned therein or not—the said debts to be fully paid, if the fund should be sufficient therefor, and, if not, they should be paid *pro rata*. The deed then adds, "It is understood and agreed that the said McNeily is to support his family upon the property hereby conveyed, until this trust is closed by a sale of the property."

A short time after the execution of the deed, a judgment was rendered by a justice of the peace for one of the debts mentioned in the deed, and an execution issued thereon, under which the defendant purchased the tools for which the action is brought. The question on the trial was, whether the deed of trust was fraudulent, as against the creditors of McNeily existing at the time. It was admitted by the defendant, that the debts mentioned in the deed were just and true, and that the property and effects assigned were not sufficient for their discharge, and also that there was no evidence of any actual fraud in the object of the deed; but it was insisted on the part of the defendant that the deed was fraudulent in law, from the stipulations on its face. By the agreement of the parties, a verdict was thereupon rendered for the plaintiff, subject to the opinion of the court upon the question, as a point reserved, whether the deed was or was not thus fraudulent. The court afterwards set aside the verdict and gave judgment of nonsuit, and the plaintiff appealed.

Osborne, for the plaintiff.
J. G. Bynum and *Avery*, for the defendant.

RUFFIN, C. J. Without the admission on the part of the defendant, that there was no actual fraud intended in the execution of the deed, the Court would hold the judgment to be erroneous. It is exceedingly difficult to find fraud, as a matter of law, unless it be so plain and express in the deed, as to constitute fraud in itself, without any inference of one fact from another, and thus appear so distinctly, as to admit of no explanation from extraneous circumstances. Where the conveyance is in trust for the maker, merely, or, upon no valuable consideration, in trust for his family, it has always been considered as constituting fraud; thus incapable of explanation. *Sturdevant* v. *Davis*, 9 Ire., 365. But where the provisions are, in the nature or under the circumstances of the particular case, equivocal, that is, may have been introduced for bad or good ends, taken as a whole, then the law cannot justly infer the dishonest intent, in order to avoid the instrument, but ought rather to presume good faith. Hence in such cases, the actual intent is a subject of enquiry by a jury and not of decision by the court. *Cannon* v. *Peebles*, 4 Ire., 204. It is argued, however, upon this deed, that it reserves to the debtor himself the management and power of disposition of the property for nearly a year, and also that one of the trusts is for his own support and that of his family for the same period; and that the provisions establish a fraud. It may be yielded, that those parts of the deed afford just grounds of suspicion, but, certainly, they are not conclusive, of an intent to the prejudice of the creditors in the actual state of things, and under which the deed would appear to have been made A man, justly indebted beyond the value of his property, and indeed, in very large sums as stated in the deed, finds himself unable to meet his

engagements and go on with his business, and makes an assignment of everything he has on earth—not reserving even the lawful allowance to insolvent debtors; and the principal part of the effects conveyed consists of a steam cotton factory and stock of cotton and wood. Now every one must know several things concerning such property in this part of the world—that its value is materially impaired by suspending its operations, and that there are but few persons among us, with skill and experience for its judicious management: and particularly, that there is no ready sale for such establishments, and a forced, public and immediate sale could, probably, be only made at a great sacrifice. Therefore, it may have been with no intent to his own benefit or to reserve to himself any wrong power, but with an eye single to the interest of his creditors in the mass, that the debtor here deferred the period, at which the sale should be made publicly, at all events for eleven months, and provided for fair sales in the meanwhile by private contract. He does not reserve that power to himself. That is not the fair construction of the deed. It is legally vested in the trustee by virtue of his estate, and the debtor was to act as "the agent of the trustee," and subject, therefore, to his approval of the contracts and receipt of the price got. It may have been, rather a stipulation for services by the debtor, than the reservation of a privilege or dangerous power to him. For, as he had conducted the business of the factory and a profit might result from working up the stock on hand, and other competent managers might not be readily procured hereabouts, it might have been important to the proper care and disposition of the trust fund, that this person should attend to the factory or seek purchasers either at home or abroad, and preserve and shew the property. If those were the purposes of the agency to be performed by McNeily, they were beneficial, not to him, but to his creditors, to whom alone the fund belonged. That they were, is rendered probable by the considera-

tion that there is no allegation, that the debts were in judgment or even suit; and hence, it would have been almost entirely in the power of the debtor, if that had been his object, to have retained the possession and use of all the property for nearly that period by pleading to suits brought against him. As that provision, might, then, have been innocent, it must be so taken—as fraud is not to be presumed. Thus regarding that part of the deed, it affords evidence rebutting, or tending to rebut, the presumption of fraud, rising out of the provision in the conclusion of the deed for the support of the debtor's family out of the property. That provision, *simpliciter*, is undoubtedly fraudulent. But it is not, in this case, an isolated stipulation, by which a benefit is secured to the debtor in spite of the creditors, and without just compensation to them therefor. The support of the family is to be for the same period, for which the debtor was to serve the trustee, and it may be fairly concluded, that the former was in remuneration for the service, We are not informed what were McNeily's qualifications for the business, nor what would be fair wages for him, nor the amount required for their support; and, if we were, the Court could not pass upon their weight, as they belong, important as these circumstances are, to the jury exclusively. It is apparent, therefore, that the questions, on which the validity of the deed depends, are questions of actual intent, and that the provisions of the deed, by itself, do not enable the Court to pronounce against it, but are proper for the jury in connection with such facts *dehors*, as the parties may be able to adduce. If, however, that were otherwise, the admissions in the case, of the value of the property, the justice of the debts and that there was no actual fraud intended, are conclusive for the plaintiff. *Hardy* v. *Skinner*, 9 Ire., 191.

PER CURIAM. Judgment reversed and judgment upon the verdict for the plaintiff according to the agreement.

ROSANNAH BRIGGS v. CHARLES BYRD.

In an action of slander, when the charge is made by using a cant phrase or a nickname, or when advantage is taken of a fact, known to the persons spoken to, in order to convey a meaning, which they understood by connecting the words (of themselves unmeaning) with such fact, the plaintiff is obliged to make an averment of the meaning of such cant phrases or nickname, or of the existence of such collateral fact, for the purpose of giving point to the words and of shewing that the defendant meant to make the charge complained of: and, in such cases, there must also be an averment, that the words were so understood by the persons to whom they were addressed.

These averments are traversable and must be proven, and differ entirely from what are called innuendoes, which need no proof.

The cases of *Hamilton* v. *Smith*, 2 Dev. & Bat., 274, and *Watts* v. *Greenlee*, 2 Dev., 115, cited and approved.

Appeal from the Superior Court of Law of YANCEY County, at a Special Term in July, 1850, his Honor, Judge *Battle*, presiding.

N. W. Woodfin, for the plaintiff.
B. S. Gaither, for the defendant.

PEARSON, J. This was an action on the case for slander. The words charged in the declaration, were that the defendant, in speaking of the plaintiff on a certain occasion, said, if they did not mind, "he would make the tray of biscuit roar before Saturday night," intending thereby to impute to the plaintiff the crime of having stolen biscuit.

On the trial, a witness was called, who testified that on a certain occasion, the defendant and the plaintiff's father were quarrelling about the running of a fence, and that, afterwards, as the plaintiff passed near where the defend-

ant, the witness and one or two other persons were standing, the defendant said that, if they did not mind, he would make the tray of biscuit roar before Saturday night. The counsel for the plaintiff then proposed to ask the witness, if he did not understand the defendant to allude to the plaintiff and to intend to impute to her the charge of stealing biscuit, a report to that effect having been circulated in the neighborhood. The defendant's counsel objected to the question, so far as it related to the identifying the plaintiff, as the person intended to be charged, and to that extent the court ruled it to be improper. The counsel for the plaintiff then asked the witness, whether he had not told the defendant, that he understood him to allude to the plaintiff and charge her with stealing biscuit, to which he answered, that he did. There was other evidence in the case, which it is unnecessary to state. The defendant had a verdict and the plaintiff moved for a new trial, because of the rejection of the testimony in relation to the understanding of the witness, as to the plaintiff being the person intended to be charged by the defendant. The motion was overruled and a judgement given from which an appeal was taken.

When a charge is made by using a cant phrase or words having a local meaning or a nickname, or when advantage is taken of a fact, known to the person spoken to, in order to convey a meaning, which they understood by connecting the words (of themselves unmeaning) with such fact, the plaintiff is obliged to make an averment of the meaning of such cant phrases or nickname, or of the existence of such collateral fact, for the purpose of giving point to the words and of shewing that the defendant meant to make the charge complained of, and, in such cases, there must also be an averment, that the words were so understood by the persons to whom they were addressed, for, otherwise, they are without point and harmless.

These averments are traversable and must be proven, and differ entirely from what are called innuendoes, which need no proof, and in fact prove themselves, their office being merely to point out the meaning and give a greater degree of certainty than is usual in conversation or ordinary writing. *Hamilton* v. *Smith*, 2d Dev. & Bat., 274. *Watts* v. *Greenlee*, 2d Dev., 115. When the words in their ordinary signification designate the person and the offence, there is no necessity for an averment, and but little use in an innuendo. But when the words do not designate the person or the offence, an innuendo will not suffice, unless it be supported by the averment of some fact. For instance, if the words are "the queen has stolen biscuit," a simple innuendo, meaning the plaintiff, will not answer, and it is not necessary to support it by averment, that it was known to the persons who heard the words, and that the plaintiff was called by that term, and that they understood the defendant to mean her, for if the meaning was not understood, the words could do her no harm. So, if the offence consist in words of themselves unmeaning, there must be an averment of some fact to support the innuendo and give them a meaning. The jury must not only be satisfied that the defendant's meaning was as charged, but that he was so understood by the persons, who heard him, which latter part can only be established by their oath. *Woolworth* v. *Meadows*, 5 East., 46. It is the same as if the charge was made in the Chinese or any other foreign tongue (which the hearers are not presumed to understand,) and in such case there must be an averment, not only that the defendant meant to make the charge, but that he was so understood by those who heard him.

In this case, the words are, "they had better mind or I will make the *tray of biscuit roar* before Saturday night;" these words are unmeaning, and point neither to to the person nor the offence. His Honor was of opinion, that it

was proper to ask the witness, what he understood the words to mean, so far as they had relation to the offence, but held that it was unnecessary so far as they had relation to the person, to whom the witness understood the defendant to attribute it. To this the plaintiff excepts. We are at a loss to perceive the ground of this distinction; the words are unmeaning, in both particulars; both equally require explanation. In fact, it is impossible to explain the one without at the same time giving an explanation of the other. The declaration contains an averment, that there had been a report, which was known to the persons, to whom the defendant spoke, that the plaintiff had stolen a tray of biscuit. The defendant and the father of the plaintiff had just quarreled, and the plaintiff was passing near the defendant and several other persons, when he used the words—meaning to charge the plaintiff with stealing biscuit, and that he was so understood by the persons who heard him. The witness was allowed to say, that by the words "tray of biscuit roar" he understood the defendant to mean that a tray of biscuit had been stolen and to threaten a prosecution, and he understood the defendant to allude to a report, which he had heard about stealing biscuit; this was only telling half of the tale, why exclude the other? The report was, that the plaintiff had stolen biscuits. If from this and the other circumstances annexed, the witness was able to understand the defendant's meaning as to the offence, he was obliged also to understand it, as to the person: and there was the same necessity and the same reason for permitting him to give his understanding in reference to one as to the other. The rules of evidence are designed to enable plaintiffs in such actions to get at the truth, and to prevent defendants from stabbing in the dark.

PER CURIAM. Judgment reversed and *venire de novo*.

CASES AT LAW

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA,

AT RALEIGH.

DECEMBER TERM, 1850.

JOHN RAY v. MALCOLM RAY.

An appeal will not lie to the superior court, from the decision of the county court, on a petition, by an alleged lunatic, to have the verdict of an inquest in his case set aside, and the guardian appointed in pursuance thereof removed.

The case of *Willis* v. *Davis*, 5 Ire., 14, cited and approved.

Appeal from the Superior Court of Law of CUMBERLAND County, at the Fall Term, 1850, his Honor, Judge *Battle*, presiding.

The plaintiff in this case filed his petition in Cumberland county court, at March term, 1849, alleging, that, at the instance of the defendant, the said court, at March term, of 1848, passed an order directing a jury to inquire

whether or not the plaintiff was a lunatic: that at June term, 1848, the jury returned a verdict finding that the plaintiff was a lunatic; whereupon the court appointed the defendant guardian to the plaintiff. The plaintiff, in his petition, alleges, that he was not then, nor is he now, a lunatic, and prays the court to set aside the former order, directing an inquest, the verdict returned thereon, and the appointment of the defendant as his guardian. The defendant answered, and the court, at June Term, 1849, ordered the following issue to be made up, "Is the petitioner, John Ray, a lunatic or not?" The jury found that John Ray was not a lunatic. "Whereupon it is adjudged by the court that the traverse of the verdict of the former jury, mentioned in complainant's petition, is sustained; and it is further adjudged, upon the finding of the jury now empanelled in the cause, that John Ray is *compos mentis*, and that the order appointing a guardian is rescinded." From this judgment the defendant obtained an appeal to the superior court of law.

In the superior court, on motion of the petitioner's counsel to dismiss the appeal for want of jurisdiction, the court orders that the appeal be dismissed. From this order the defendant appealed to the Supreme Court.

Banks, for the plaintiff.

No counsel for the defendant.

PEARSON, J. There is no error in the record. The guardian of the lunatic had no right of appeal from the judgment of the county court. The question is settled. *Willis* v. *Davis*, 5 Ire., 14.

PER CURIAM. Judgment affirmed.

JONATHAN OSBORNE v. WILLIAM HORNER.

One, who has only a verbal authority to sell a slave can transfer the title by a sale and actual delivery.

Appeal from the Superior Court of Law of GRANVILLE County, at the Fall Term, 1850, his Honor, Judge *Manly*, presiding.

This case was an action of trover, in which damages, for the conversion of a slave named Esther, were demanded. It appeared that the slave had belonged to the defendant, and was loaned by him to his daughter, upon her intermarriage with one Joseph M. Hicks. The said Hicks afterwards sold the slave to the plaintiff, having an oral authority only from Horner to do so, and at the same time gave him a bill of sale, receiving the consideration money, and delivering the slave pursuant to the bill of sale. The conversion was admitted. Upon this state of the facts, the court was of opinion, that the plaintiff had not acquired a title to the slave, and could not therefore recover, and so instructed the jury. The plaintiff's counsel asked his Honor to charge the jury, that if they believed Hicks had oral authority from the defendant to sell and deliver the slave, and that the authority was unrevoked at the time of the sale, and the sale and delivery were made by virtue of the authority, the fact that the said Hicks, the witness, executed a bill of sale in his own name, did not affect the plaintiff's title; which the court declined giving.

There was a verdict for the defendant. Rule for a new trial discharged; and an appeal.

Gilliam and *Lanier*, for the plaintiff.
McRae, for the defendant.

PEARSON, J. An agent, having a verbal authority to sell a slave, does sell and deliver the slave and receive the purchase money, and at the same time, executes a bill of sale, under seal with warranty, in his own name, without any reference to the principal; does the title of the slave pass to the purchaser? The judge in the court below held, that it did not. In this, we think, there is error.

His opinion, we presume from the argument made in this Court, was influenced by the suggestion that, as there was a bill of sale executed by the agent at the same time, the title could not pass by the sale and delivery, and as the bill of sale was not binding upon the principal, the title did not pass in either way.

The proper view of the question, as it seems to us, is this: The principal says the bill of sale is inoperative, so far as he is concerned, because the agent was not authorized to bind him by a *deed*. That is true, and therefore, it has no effect whatever, except so far as it may subject the agent upon his covenant of warranty. But it has no effect in reference to these parties. So the transaction is left as a mere sale and delivery of a slave, by one having a verbal authority to sell. Such a sale is valid.

PER CURIAM. Judgment reversed and a *venire de novo* issued.

NEILL CURRIE v. SAMUEL SWINDALL.

Where an action is brought by a plaintiff to recover the amount of a reward, offered by the defendant, for the apprehension and delivery in jail of an individual charged with a criminal offence, it is incumbent on the plaintiff to prove that he either compelled the individual by force, or induced him by persuasion, to make the surrender.

If the surrender of such individual was wholly voluntary, although the plaintiff accompanied him to the jail and saw him lodged there, he has no right of action.

Where an agent is authorized to offer a reward for the apprehension of an individual, it is only necessary to prove that this was done—the mode of doing it is entirely immaterial.

Appeal from the Superior Court of Law of BLADEN County, at a Special Term in December, 1850, his Honor, Judge *Dick*, presiding.

This was an action of assumpsit, brought to recover the sum of one hundred dollars, which, it was alleged, the defendant had offered to give any one, who would apprehend and commit to prison, a certain person of color, named Chavis, charged with homicide.

The plaintiff proved by a Mr. McNeil, that the defendant requested him (the witness) to offer a reward of one hundred dollars in his (the defendant's) name to any person, who would apprehend and commit to jail the said Chavis: that the defendant did not direct in what manner the reward should be offered, whether by written advertisement or by publication in a newspaper: that he (the witness) wrote to the editor of the *Fayetteville Observer*, and the purport of what he had written was (here the defendant's counsel objected, that the witness could not speak of

what he had written to the editor without producing the letter or accounting for its absence, but the court permitted him to proceed) contained in the newspaper then before the court, dated Nov. 20th, 1848. The plaintiff then introduced the jailer of the county, who proved, that the plaintiff came to his house on the Saturday night before the trial of the culprit, distant from the jail about two hundred yards, and told him he wished him go to the jail: that he accordingly went, and found there Chavis and a man by the name of Smith with him: that the said Chavis was not confined in any way, and upon the jailer's opening the door, the plaintiff told Chavis to go in, which he accordingly did.

It was in proof, that Chavis was tried the week following the Saturday night of his going into custody, being the spring term, 1849, of Bladen superior court of law. It was also in proof, that the culprit Chavis was in the employment of the plaintiff, at the time of the homicide. The defendant offered to prove, that he was in the employment of the plaintiff after his trial, but this latter evidence was objected to and excluded by the court.

There was no proof, that the plaintiff made any effort to arrest the culprit, nor was there any proof of his having arrested him, but that before stated.

The defendant contended, among other things, that the plaintiff had not, in fact, apprehended the culprit, but that he had intended to come in of himself, and the plaintiff being aware of it, merely accompanied him to claim the reward; and this, it was insisted, was inferable from the facts, that it was just the Saturday night before his trial that the culprit came in: that he came untrammelled: that there was no show of force or constraint upon him: that he had been in the employment of the plaintiff at the time of the homicide; and that no proof had been offered of any act of arrest by the plaintiff, or even of his having

searched for the offender. And the defendant's counsel prayed the court to instruct the jury, that if they believed the culprit had come in of his own accord, and although the plaintiff may have accompanied him, yet if it was not in consequence of any force or persuasion used by the plaintiff, the plaintiff was not entitled to recover.

The court refused to give the instruction prayed for, but told the jury, that it was not necessary for the plaintiff to have brought Chavis to jail by force to enable him to recover, but if he had induced Chavis to come to jail by persuasion and promises of assistance, it would be the same as if he had used force. The only evidence, how Chavis got in jail, was the evidence of the jailer, and they must decide upon that, whether the plaintiff had brought Chavis and put him in jail, and, if they found for the plaintiff on this point, and also found, that the defendant had authorized McNeil to offer the reward, as stated by McNeil, then the plaintiff was entitled to recover; and there was no evidence calling for such instructions as the defendant's counsel had asked for, A verdict being rendered for the plaintiff, and a rule for a new trial discharged, the defendant appealed.

W. Winslow, for the plaintiff.

Strange and *McDougald*, for the defendant.

PEARSON, J. There is error in the refusal to give the instruction prayed for, and in the manner in which the case was left to the jury.

The instruction concedes, that the plaintiff is entitled to recover, if the person accused surrendered himself, in consequence of either force or persuasion used by the plaintiff; but it asserts, that if the man surrendered himself of his own accord, the plaintiff is not entitled to recover. There can be no question of the truth of the proposition asserted; for, if the man surrendered himself of

his own accord, without any force or persuasion on the part of the plaintiff, then he has not performed the services for which the reward was offered. Indeed, his Honor does not deny the proposition, but refuses "to give the instruction;" and after reciting what the defendant had conceded, "that it was not necessary for the plaintiff to have brought the man to jail by force, but if he had induced him to come to jail by persuasion and promises of assistance, it would be the same as if he had used force," he proceeds to instruct the jury, "that the only evidence, how the man got in jail, was the testimony of the jailer, and they must decide upon that, whether the plaintiff had brought and put him in jail;" and puts his refusal to instruct the jury, as prayed for, on the ground, that there was no evidence to raise the question.

There is error in thus narrowing down the case, and, in effect, deciding it. The man is in jail—he was induced to come either by force or persuasion used by the plaintiff, or he came of his own accord. There is no evidence, that he came of his own accord—*ergo*, he came by force or persuasion used by the plaintiff.

There is no evidence that the plaintiff had used force to apprehend the man. The testimony of the jailer, although not inconsistent with the idea, that the plaintiff had, by persuasion, induced the man to surrender himself, was, by no means, conclusive of the fact, and did not exclude the idea, that he had surrendered himself of his own accord. So, the fact, that the surrender was made on Saturday night before court, was consistent with either view of the case. The same may be said of the other fact, that the man was in the plaintiff's employment at the time of the homicide. And it seems to us, that there was nearly, if not quite as much, ground for instructing the jury, that there was no evidence that the surrender was made in consequence of persuasion used by the plaintiff, as for the instruction, that there was no evidence

that the man surrendered himself of his own accord. That enquiry ought to have been submitted to the jury, with instructions, that the burthen of proof was on the plaintiff; and, in the absence of any proof of an act done or words used by him, tending to induce the man to surrender himself, if the jury could not satisfy themselves how the fact was, they should find for the defendant.

There is no error upon the question, relative to the letter of McNeil to the editor of the *Observer*. It was not necessary to prove its contents. It was sufficient to prove, that the defendant had authorized McNeil to offer the reward, and that it was offered. The mode, in which McNeil procured it to be done, was wholly immaterial.

As to the other question, it is only necessary to say, that, in a case depending on well balanced circumstances, the fact, that the man after his acquittal went to work with the plaintiff, might have had some weight on one side or the other; and in a case of circumstantial evidence, the facts following, as well as those which precede, and those which accompany the act, are sometimes important.

PER CURIAM. There must be a *venire de novo*.

ALEXANDER D. McRAE v. DANIEL D. McRAE.

A. died leaving three children, of whom B., the defendant, was the guardian, and who had slaves left to them by will by C. to the amount of upwards of six hundred dollars. B. gave to D., the plaintiff, a bond, executed on the 4th of February, 1846, of the following purport: "I promise to pay D. three hundred and sixty dollars, being in consideration of money which he paid for A. and his heirs, which sum I am to pay when it can be raised out of the estate left to them by the will of C." The writ was issued nearly three years after the date of the bond;

Held, that the true construction of this bond is, not that the payment should be delayed, until the guardian could raise the amount out of the hire and profits of the property, but that it should be made as soon as the guardian could, by proper proceedings, raise the money by the sale of the property, and that this could have been done within less than three years.

Appeal from the Superior Court of Law of RICHMOND County, at the Fall Term, 1850, his Honor, Judge *Battle*, presiding.

This was an action of debt upon a bond, of which the following is a copy: "With interest from date, I promise to pay to Alexander D. McRae the sum of three hundred and sixty dollars, being in consideration of money, which he paid for Hugh D. McRae and his heirs, which sum I am to pay, when it can be raised out of estate left to them by the will of Daniel McRae, their father. In witness whereof, &c., dated 4th of February, 1846, and executed by Daniel D. McRae."

The defense relied on was, that the bond showed upon its face, that it was payable upon a condition precedent, which had not been performed.

The plaintiff produced in evidence the will of Daniel McRae, dec'd, in which was the following clause: "I give

and bequeath to my son, Alexander McRae, for the sole and separate use and benefit of my son Hugh McRae, in trust, the following slaves, viz.: Ehloe, and her child Hannah, Sam, Abram and Dinah, together with their future increase; also, I give and bequeath the one-half of the tracts of land, whereon I now live, containing seven hundred and fifty acres, for the sole and separate use of my son Hugh McRae, during his natural life, and at his death to his heirs forever." He then proved, that Hugh McRae, mentioned in the said clause, had died, leaving three children, to whom the defendant had been regularly appointed guardian; and that two of the slaves mentioned in the clause aforesaid, were worth about six hundred dollars. The writ was issued on the 15th day of January, 1849, nearly three years after the date of the execution of the bond; and the plaintiff contended, that the defendant had had ample time to have raised the amount, mentioned in the bond, by a sale of the property of his wards: that it was his duty by law so to have done; and that his neglect or delay in so doing ought not to prevent the plaintiff from recovering.

The defendant contended, that the true construction of the bond was, that the money was to be raised out of the rents and profits of the property of his wards: that he had no right to sell it, or any part of it, to pay the bond; and that there was no evidence, that any rents or profits had been received by him, nor even that the property had been delivered over to him, except what might be inferred from his appointment as guardian; and that consequently the plaintiff could not deliver. And of this opinion was the court, in submission to which the plaintiff was nonsuited, and appealed to the Supreme Court.

No counsel for the plaintiff.
Strange, for the defendant.

MORTON *v.* INGRAM.

PEARSON, J. This was debt on a bond for $360. The defense was, that payment was not to be made, until the defendant, as guardian of the children of Hugh McRae, could raise the money out of the *rents and profits* of the property of his wards.

His Honor was of opinion, that such was the proper construction of the bond. In this, we think, there is error. It is true, that for the maintenance and education of a ward, the guardian has no right to expend more than the income. But for the payment of debts, for which his ward is liable, a guardian has it in his power, by proper proceedings, to sell the real, as well as the personal estate.

The true construction of the bond is, that the money was to be paid as soon as it could be raised by a sale of the property of the wards of the defendant. He was bound to procure a sale for that purpose within a reasonable time. Certainly, it could have been done within sometime short of *three* years.

PER CURIAM. There must be a *venire de novo*.

SAMUEL P. MORTON and wife, et al. v. INGRAM, et al.

A person, named as executor, is not competent as an attesting witness to a will of personalty. Nor will his subsequent renunciation and release make him so. He must be disinterested at the time of attestation.

The cases of *Allison* v. *Allison*, 4 Hawks., 141, and *Tucker* v *Tucker*, 5 Ire., 161, cited and approved.

Appeal from the Superior Court of Law of ANSON County, at the Fall Term, 1850, his Honor, Judge *Battle*, presiding.

MORTON *v.* INGRAM.

This was an issue, *devisavit vel non* made up to try whether a certain script was the last will and testament of Isham Ingram, deceased. While the issue was pending in the county court, the caveators had an entry made upon the records of the court, that they admitted the script to be the last will and testament of the said Isham Ingram, as to his real estate therein devised, and contested it only as a will of personalty. Upon the trial of the will in the county court, the jury found it to be the will of the said deceased, both as to his real and personal estate, and from the judgment thereon the caveators appealed to the superior court. At the trial in the superior court, Dr. Christopher Watkins, one of the subscribing witnesses to the script, was offered as a witness to prove its due execution, but he was objected to as a witness to prove the script to be a will of personalty, because he was named executor therein. The plaintiff then exhibited a release from the said Christopher Watkins, of the following purport, to-wit: that he had no desire or intent of acting as executor, or of taking upon himself any of the trusts mentioned in the said paper writing, and which by law might be cast upon him—that therefore, and in consideration thereof, he released to Joseph Ingram, &c., all right, trust and interest, which, by the said appointment as executor aforesaid, or by law, or otherwise, he might or could have by reason of said appointment, thereby renouncing and absolutely refusing to assume or take upon himself any of the rights or trusts of an executor under said paper writing, purporting to be the said Isham Ingram's will. The court held that the said witness was incompetent to prove the script to be a will of personalty; and the jury, under the charge of the court, found the script to be the last will and testament of the said Isham Ingram, deceased, as to the real

estate therein devised, but not his last will and testament, as to his personal estate therein mentioned. Judgment was given accordingly, and also against the plaintiffs for the costs, and the plaintiffs appealed.

Mendenhall and *Dargan*, for the plaintiffs.
Winston and *Miller*, for the defendants.

PEARSON, J. There is no error. The only question presented is, whether the person, named as executor, is competent as one of the *attesting* witnesses to a will of personalty. It is settled, that the witness must be disinterested at the time of the attestation, and it is decided in *Allison* v. *Allison*, 4 Hawks., 141, cited and approved in *Tucker* v. *Tucker*, 6 Ire., 161, that a right to commissions is such an interest as disqualifies a witness. An executor has a right, by law, to commissions upon the receipts and disbursements of the assets. The fact, that the witness renounced, and executed a release, does not remove the disqualification, which existed at the time of the attestation.

No unnecessary costs were incurred in reference to the will, so far as it concerned the real estate. It was, therefore, right to require the propounders to pay the costs of the proceeding.

PER CURIAM. Judgment affirmed.

THE STATE to the use of RICHARD J. GREGORY v. WILLIAM R. HOOKS, et al.

When, in an action upon a constable's bond, the breach assigned is, that the constable "had failed to return to the relator the note" which he had placed in his hands for collection, it is a sufficient defense for the officer to shew, that he had obtained a judgment on the note; for then the note became merged in the judgment and remained in the hands of the justice.

Appeal from the Superior Court of Law of WAYNE County, at the Fall Term, 1850, his Honor, Judge *Ellis*, presiding.

This was an action of debt upon the official bond of the defendant, Hooks, executed in February, 1845, for the faithful discharge of the duties of the said Hooks, as constable for the ensuing year. The plaintiff alleged that the relator had placed in the hands of Hooks, during that year, a certain note for collection. The declaration charged three breaches of the bond in relation to this note, the two first of which it is unnecessary to state, as no question upon them was presented to the Supreme Court. The third breach assigned was, that "the defendant Hooks had failed to return the note to the relator," his engagement having been to collect the note or return it. Upon the latter count, it appeared, that the defendant, Hooks, had been elected constable for one year from February, 1845, and had entered into the bond declared on—that during that year the relator had placed in his hands for collection, as constable, the note in question, which the said Hooks promised to collect or return—that, within a day or two after Hooks received the note, a judgment was obtained thereon and execution was sued out against the maker. A

demand by the plaintiff was admitted, and the note had never been returned, nor accounted for to the relator, nor did the defendant offer to return it upon the trial. The plaintiff contended, that he was entitled to recover the full amount of his claim, as the note had never been returned.

The court charged the jury, that, as to the third breach alleged, for a failure to return the note, the plaintiff was entitled to recover, but they should give him only nominal damages, as there was no evidence that the maker of the note was able to pay it, at any time after it had been received by Hooks.

The jury returned a verdict for the plaintiff upon the third count only of the declaration, and gave nominal damages.

From the judgment thereon the plaintiff appealed.

J. H. Bryan, for the plaintiff.

Mordecai and *Washington*, for the defendants.

PEARSON, J. The third breach assigned is, that he "had failed to return the note to the relator." Upon this (which is the only matter excepted to) the charge is, "for a failure to return the note, the plaintiff is entitled to recover nominal damages only." To this the plaintiff excepts. There is no ground for the exception, for, admitting that his Honor ought to have charged, that, unless the note was returned or *accounted for*, the plaintiff was entitled to recover its value, as being converted and applied to his own purposes by the officer, the exception was untenable, because the case states, that, "in a day or two after the note was put into his hands, a judgment was obtained thereon and execution sued out." This accounts for the note; it merged in the judgment, was cancelled, and remained in the hands of the justice.

Whether the plaintiff would have been entitled to any, and what damage, if a failure to return the *judgment* had been assigned as a breach, is a different question; for a judgment is a *quasi* record, and ought properly to be retained by the justice. We are not informed what is the fact in reference to this matter; at all events the judge did not decide this question, and the exception does not raise it.

There is no error, of which the plaintiff has a right to complain.

PER CURIAM. Judgment affirmed.

DEN ON DEMISE OF WILLIAM B. EDMUNDSON v. WILLIAM HOOKS.

What the description in a deed for land means, or whether it conveys any definite idea, are questions for the court, and ought not to be left to the jury.

Appeal from the Superior Court of Law of WAYNE County, at the Fall Term, 1850, his Honor, Judge *Ellis*, presiding.

This was an action of ejectment, in which the lessor of the plaintiff claimed title to the premises in dispute, by purchase at a sheriff's sale, made under several judgments and executions, tested from Nov., 1845, to June, 1846, of which regular transcripts were produced; and the plaintiff also produced a deed from Otlin Carr, sheriff of Wayne, which, it was alleged, conveyed to him the title to the premises. The sheriff's deed recited several executions against John Hooks and other persons, that in pursuance

thereof he levied upon *certain pieces or parcels of land, situate, lying and being in the county of Wayne, to-wit: defendant's lots at Nahunta Depot, and land joining Ichabod Pearson and Josiah Evans, and Daniel Hanell and others*, and that he afterwards, at public auction, sold the said premises to William B. Edmundson, and the deed then, in consideration of the premises and the purchase money paid, conveyed the said pieces or parcels of land, as above described, and their appurtenances to the said William B. Edmundson in fee. The plaintiff then proved, that John Hooks, the tenant in possession, had been in possession of the premises for several years prior to the sale made by the sheriff, was in possession at the time of the sale, and has continued in possession ever since. The sheriff was introduced, and proved that he levied on the lot described in the declaration, (the description in the declaration corresponded substantially with that in the sheriff's deed,) under the executions above referred to, and sold that identical lot on the 16th of November, 1846, when the lessor of the plaintiff became the purchaser, and that he intended to convey the same by his said deed.

The defendant, William Hooks, who had been admitted to defend as landlord of John Hooks, gave in evidence a deed from John Hooks, (under whom the plaintiff claimed) to Wright Woodard, one of the defendants in the above executions, dated 9th of May, 1844, and also a deed from the said Woodard to him, William Hooks, dated 21st of November, 1846, and contended that thereby the legal title vested in him, and therefore the plaintiff could not recover. He further proved, that, although the lots sued for adjoined A. G. Person, they did not adjoin Daniel Hanell; but that John Hooks, one of the defendants in the executions, had land which did adjoin Person and Daniel Hanell and others, and contended that this land,

and not the lots, must be held by a proper construction of the levy to have been levied on. The defendant further contended, that the description of the lots in the sheriff's deed to Edmundson was entirely too vague and uncertian to operate as a conveyance of land. The defendant further proved, that, at the execution sale, at which Edmundson bought, the sheriff declared, that he only intended to sell the interest of John Hooks, and that, therefore, no interest of Woodard could pass by the sale.

The plaintiff insisted, that whatever interest John Hooks had in the premises, at the time of the sale made by the sheriff, if nothing more than a naked possession, was transferred to him, and that he had a right to be put in possession of it, and that William Hooks, as landlord, could not set up any title acquired by him subsequently to the sale, in opposition to the plaintiff's title and to defeat his claim.

His Honor overruled the defendant's objections, and instructed the jury, that, if they believed the premises in dispute were included under the levy, and the sheriff's deed to the lessor of the plaintiff, the plaintiff was entitled to recover.

The jury found a verdict in favor of the plaintiff, and from the judgment thereon the defendant appealed.

Mordecai, for the plaintiff.

J. H. Bryan, with whom was *Washington*, for the defendant, relied on the following points:

The land is described in the sheriff's deed as "the defendant's lots at Nahunta Depot." This description is too vague and indefinite, and the sheriff's intent, as to what he sells, can only be collected from the deed itself. *Sheppard* v. *Simpson*, 1 Dev., 244; *Massey* v. *Bellisle*, 2 Ire., 177.

A party connusant of his right may sell by a general description—anofficer must *define* what he sells. *Jack-*

son v. *Delaney*, 11 J. R., 273; *Jackson* v. *Roosevelt*, 13 J. R., 103.

The judge left a question of law to the jury. He told them "if they believed the premises were included in the sheriff's deed," &c., the plaintiff was entitled to recover. Parol evidence is admissible to apply the description in a deed to its subject matter—but what the deed conveys and what is its legal operation is matter of law.

PEARSON, J. The sheriff held several executions against John Hooks and others: one against John Hooks alone, and one against John Hooks and Woodard. The deed recites all of these executions: a levy upon "the defendant's lots at Nahunta Depot," a sale, and thereupon conveys "the lots levied on" to the lessor. The question is, does this deed vest the title of the lots sued for, in the lessor? We think the description too vague and uncertain, and therefore, the deed passes nothing.

The execution against John Hooks and Woodard, was not levied on the lots, and has no bearing on the case.

"The defendant's lots at Nahunta Depot" is the description; what it means, or whether it conveys any definite idea, was a question for the court, and ought not to have been left to the jury. It has no definite meaning. If we suppose it means lots belonging to all of the defendants, there is no subject to fit it! If we suppose it means lots belonging to John Hooks, one of the defendants, still there is no subject to fit it: for, although John Hooks lived on the lots sued for, and they might have been described as "the lots on which John Hooks now lives," yet they do not answer the description supposed, for in fact they did not belong to him, as he had, some two years before, conveyed them to Woodard. The description is unmeaning, and the court should so have instructed the jury.

This defense does not at all impugn the rule, that William Hooks, defending as landlord, could only make such

defense as was open to the tenant; because he was at liberty to say to the purchaser at the sheriff's sale, "Your deed does not cover the land."

PER CURIAM. Judgment reversed and *venire de novo*.

JOHN SIMPSON v. NATHAN KING, et al.

A testatrix bequeathed as follows, "My girl Maria, after my death, I do not leave her as a bond slave to any person, I wish her to live among my children, or otherwise if she sees proper. I leave J. S. to act as trustee for said girl." Also, "I will and bequeath twenty-five dollars to Maria;" *Held*, that, under this will, J. S. took the legal title to the girl Maria.

Appeal from the Superior Court of Law of CASWELL County, at the Fall Term, 1850, his Honor, Judge *Manly*, presiding.

This was an action of detinue for the slaves Maria, &c., tried upon the plea of *non detinet*.

In the last will and testament of Letitia Foster, who died and whose will was admitted to probate in 1837, appears the following clause, to-wit: "My girl Maria, after my death, I do not leave her as a bond slave to any person, I wish her to live among my children or otherwise, if she sees proper. I leave John Simpson to act as trustee for said girl." And in another clause she says, "I will and bequeath twenty-five dollars to Maria." Under this will, the plaintiff claims the slaves in question.

It appeared in evidence, that a short time after the death of Mrs. Foster in the same year, Nathan King, the executor, and now one of the defendants, consented that the

plaintiff might take the negro Maria, which he accordingly did, and she has since been under his control, up to within a short time before the institution of this suit, when the defendant, King, and the other defendant, one of the next of kin of the testatrix and interested in her estate, took possession of the slave, Maria, and the other slaves, who are the children of Maria, born since the death of the testatrix and since possession was given to the plaintiff; and the defendants, upon demand, have refused to surrender them to the plaintiff.

The point raised by the defendant's counsel was, whether by the will and the facts of the case, any such estate was vested in the plaintiff, as would enable him to maintain this suit.

The court was of the opinion that there was a manifest intent in the clause of the will in question to vest in the plaintiff a trust estate in the *person* of the woman, and this, connected with an assent by the executor, would operate to confer upon the plaintiff the legal estate, which was all that was necessary to support the action in this Court.

The jury, under the instructions of the court, found a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

Kerr and *T. Ruffin, Jun.*, for the plaintiff.
Morehead, for the defendants.

PEARSON, J. The declaration by the testratrix, that she does not leave the girl Maria, as a *bond* slave to any person; the legacy to her of $25, which she could only take as a person, as distinguished from mere property, and the appointment of Simpson to act as trustee *for* her, treating her as a person, instead of appointing him a trustee *of her*, treating her as property, furnish strong ground for the position, that it was not the intention of

the testatrix to bequeath the legal title of the girl, as property, to Simpson. As the girl was the property of the testatrix, upon her death, the legal title must belong to some one, and unless it was the intention to give it to Simpson, it remains with the executor; and thus the assumed purpose of the testatrix would be defeated, because it would be impossible for Simpson to act as trustee *for* the girl, as a person, or as trustee *of* her property, if the legal title remained with the executor.

He was made trustee for the one purpose or the other, and neither can be accomplished without giving him the legal title. We do not feel at liberty to adopt a construction, by which the appointment of Simpson as trustee would be rendered wholly nugatory, and the purpose of the testatrix be necessarily defeated; not by reason of anything *dehors*, but by reason of an intrinsic defect in the will; and we therefore conclude, that the legal title is given to Simpson.

It is evident, that the testatrix supposed she had a right to confer on the girl the privilege of acting as a free person, provided she appointed a trustee to act for her, by which she means, some person to act as her *ostensible owner;* but in whom the confidence or trust was reposed, that although he was in law the master, yet he would not treat her as a *bond* slave, but would allow her to live among the children of the testatrix, or elsewhere, if she saw proper, as a privileged person. The trust is clearly unlawful, and the result of this suit can be a matter of but little consequence, for the residuary legatees, if there be any, if not, the next of kin, in equity have the trust declared void, and call for the legal title.

PER CURIAM. Judgment affirmed.

DOE ON DEMISE OF WIGGINS' HEIRS v LASSITER REDDICK.

In ejectment the rule is well established, that when a person is admitted by the court to defend as landlord, which he has a right to claim, he stands in the place of his tenant, and can make no defense which the tenant could not have made.

The cases of *Balfour* v. *Davis*, 4 Dev. & B., 305; *Wise* v. *Wheeler*, 5 Ire., 196, and *Lee* v. *Hannegan* 7 Ire., 471, explained and approved.

Appeal from the Superior Court of Law of GATES County, at the Fall Term, 1850, his Honor, Judge *Caldwell*, presiding.

On the trial of this ejectment, the lessors of the plaintiff deduced title to the land in dispute through a deed from one Benton to their ancestor, executed in August, 1841. This suit was commenced against Benton, and the defendants were allowed by order of court to come in and defend as landlords of Benton. They alleged that they had purchased the said land, as the property of the said Benton, at a sheriff's sale subsequent to 1841, and that the deed from the said Benton to the ancestor of the lessors of the plaintiff was made, expressly to defraud one of the defendants of a large debt, which he had against the said Benton, on which there had been a judgment and execution, and under which the said land had been sold, when they became the purchasers; all of which they offered to prove. The introduction of the testimony was opposed by the counsel of the plaintiff, on the ground that Benton was estopped, as against the lessors, and the same estoppel extended to the defendants.

The court received the testimony and the defendants had a verdict. From the judgment thereon the plaintiff appealed.

A. Moore and *W. N. H. Smith*, for the plaintiff.

Heath, for the defendants.

PEARSON, J. It is stated in the record, "At fall term, 1846," "Timothy Lassiter, Wiley Reddick, and Lassiter Reddick, came into court *as landlords*, enter into the common rule, and are permitted to defend." A landlord has a right to be made defendant with his tenant, when he appears, or to defend in his stead, if he fails to appear, but in either case he can only make such defense, as the tenant can make. He stands with, or in the place of, the tenant, and is entitled to his rights, and is subject to his disadvantages. *Balfour* v. *Davis*, 4 Dev. & Bat., 305; *Knight* v. *Smyth*, 4 Maule & Selwyn, 347.

Wise v. *Wheeler*, 5 Ire., 196, and *Lee* v. *Hannegan*, 7 Ire., 471, were cited by the defendant's counsel, as being, in some measure, opposed to the rule above laid down. But it will be seen, upon examination, that such is not the fact. The former case expressly admits the general rule in reference to landlords, and takes a distinction, because John H. Wheeler did not profess upon the record to be the landlord; and, inasmuch as no stranger has a right to defend with, or in the place of, the person in possession, the court inferred, that Wheeler, upon the default of the person in possession, had been allowed, by the *consent* of *the plaintiff*, to make himself defendant, and was at liberty to take an independent position. In the latter, the case states, that Mary Hannegan was made defendant by the consent of the plaintiff, and no objection was made to her defense. So both these cases recognize the well settled rule in regard to landlords. There is error in allowing the defendants to rely upon a ground of defense, which

was not open to Benton, the person in possession, for, except as his landlords, they had no right to make themselves defendants, and, after doing so, they were bound to act up to the relation which they professed, in order to get the privilege of making defense.

There is some discrepency between the record, and the case made by the judge. This states, "this suit was commenced against Benton, and the defendants were allowed, by an order of court, to come in and defend." If a contradiction occurred, we should be bound by the record, because the province of the judge is simply to state the case; the record is sent to speak for itself. There is, however, no contradiction; the judge makes a general statement, which is reconcilable with the particular statement of the record.

It is probable, the attention of his Honor was not directed to the statement in the record, that the defendants were allowed to defend *as landlords*, and because he thought the case within the decision of *Wise* v. *Wheeler*, and not under the general rule.

PER CURIAM. Judgment reversed and *venire de novo*.

JOHN PATTERSON v. JOHN BRITT, et al.

The acts of a ministerial officer, as a constable or sheriff, in making returns on warrants and writs, although required by law to be returned into a court of record, do not make a part of the *record*, are only *prima facie* taken to be true, and may be contradicted and shewn to be false, antedated, &c.

A sheriff cannot be made responsible for the acts of a constable, who sometimes acted as his deputy, but never without a special deputation, and who has committed a trespass by levying a void attachment, unless it can be shewn that he was expressly authorized by the sheriff to levy such attachment

Much less can he be responsible, when the constable returns the attachment levied by him *as constable*, although by an order of court the return is permitted to be amended by stating the levy to have been made by *the sheriff* by the said constable as his deputy, the sheriff's office having then expired and the order of amendment having been appealed from.

The case of *Smith* v. *Lowe*, 5 Ire., 197, cited and approved.

Appeal from the Superior Court of Law of BEAUFORT County, at the Fall Term, 1850, his Honor, Judge *Ellis*, presiding.

This was an action of trespass *de bonis asportatis*.

The plaintiff alleged, that he was in the possession, and owned a stock of merchandise, on the 28th of June, 1847, when they were taken from him by one Exum, who professed to levy upon them in pursuance of an illegal attachment, sued out by the defendant, Britt, and that he did the act as deputy of the other defendant, Edmundson, who was at the time the sheriff of Greene county, when the goods were taken.

The defendants pleaded severally the general issue, and justification.

It was proved by the witnesses, that the plaintiff was the

owner, and in possession of a stock of dry goods, groceries, and a variety of articles of merchandise in the town of Snow Hill, and county of Greene, on the 28th of July, 1847.

It was also proved, that, on that day, the defendant, Britt, sued out an attachment against the property of the plaintiff, for the sum of four hundred and fifty dollars. It was issued by a justice of the peace, directed to "any constable or other officer" of Greene county, and made returnable before the justice issuing it, or any other justice of the peace for Greene county.

This attachment was placed in the hands of one Exum to execute. Said Exum was, at the time, a constable in Greene county, and sometimes acted as deputy sheriff for the defendant Edmundson; but only when specially deputized. It was also proved, that the entire stock of merchandise of the plaintiff was taken from his possession by the said Exum, who professed to levy upon the same, under said attachment. It did not appear that the said Exum had any valid process against the plaintiff on the 28th of July, 1847, but it did appear that on the following day, the 29th, he had other regular attachments authorizing him to levy on the property of the plaintiff.

The witnesses differed as to whether the property was taken under the defendant, Britt's attachment, upon the 28th or 29th of July of said year. Two witnesses stated, that it was on the 29th, and one stated that it was on the 28th; and the levy, endorsed upon the attachment itself, which was subsequently returned to the county court, was dated as having been made on the 28th of July, 1847. By a record introduced by the plaintiff, it appeared, that the said attachment was returned into the court of pleas and quarter sessions for Greene county, at its next regular term after July, 1847, to-wit, in August, 1847;

when the defendant, Britt, applied to the court to order it to be docketed, and for leave to amend by making the attachment returnable to the said court of pleas and quarter sessions at its said term, and for leave to amend the officer's return, and the direction of the attachment. The court ordered the case to be placed upon the docket, and allowed the amendments to be made, as moved for, and they were actually made, from which order of amendment the plaintiff took an appeal to the superior court. The return upon that attachment, as amended, as appeared from said transcript of the record of said court, recited that said attachment had been executed by levying upon the aforesaid property of the plaintiff on the 28th of July, 1847, and was signed "Haywood Edmundson, sheriff, by Jas. E. Exum, deputy sheriff." It appeared from the record, that the defendant, Edmundson, resigned his office of sheriff, on Tuesday of the term, when another person was elected, and the amendments to said attachment were allowed, on Wednesday of the same term of the court, and that the first return was endorsed by Exum, as constable, upon the said attachment. Upon the question of damages the plaintiff called John S. Hardie, who testified that the stock of goods, which the plaintiff had on hand when they were taken by Exum, was worth between four and five thousand dollars. Joseph Dixon, a witness, thought the goods were worth from three to four thousand dollars, when Exum took them. The plaintiff proposed to show, for the purpose of recovering vindictive damages, that he had been forced by a body of armed men to leave his store-house, and goods at Snow Hill, on the 27th of July, 1847, and that he was subsequently kept away by the same means, and that these facts, and the cause of his absence, were known to these defendants and said Exum, the deputy of the defendant, Edmundson, when the said attachment was sued out on the next day, and

the goods taken by Exum. The defendants objected to the evidence, but it was admitted by the court.

The defendants introduced evidence of regular and valid process by attachment, placed in the hands of Exum on the 29th of July, 1847, against the plaintiff's property.

The defendants also called a witness to prove, that, when Exum took the property of the plaintiff under the attachment of the defendant, Britt, he was acting as constable, and not as the deputy of the defendant, Edmundson. Upon objection on the part of the plaintiff, the court expressed the opinion, that it was immaterial how the fact was, as the return of the defendant, Edmundson, to the county court, (which is heretofore set forth) after the amendment was allowed, amounted to an acquiescence in the trespass, which had been theretofore committed by the said Exum, when professing to act under the said attachment, if the act was a trespass: That it appeared from the record of the said court, that the return was made by the defendant, Edmundson, through Exum, his deputy, and the return thus appearing of record was full and conclusive proof, that it was the act of Edmundson, and he could not now be heard to deny it, at least so far as the fact of its being his return. And, by this act of record, he assented to, and adopted all the previous acts of the said Exum done under the said attachment. The evidence was not heard. It was proved by the defendants, that a part of the said goods came to the hands of one Vass, with the assent of the plaintiff, and another portion to the hands of one Williams, under orders of the county court of Greene, by consent of parties, made in the case of the defendant, Britt, against this plaintiff, relative to the said attachment, returned to the said court; and that another part came in the same way to the hands of one Moses Patterson. It was also proved by the defendants, that a part of the said goods had been sold by the said Exum and the proceeds applied to the payment of regular

attachments, placed in his hands on the 29th of July, 1847. The defendants also introduced evidence of the value of the several amounts of goods, that came to the hands of the respective parties above named, and the amount applied by Exum to valid attachments.

The court charged the jury, that the plaintiff's right to recover depended entirely upon the question, whether the goods were taken on the 28th or 29th of July, 1847. If they were taken on the 29th, they should return a verdict for the defendants, because, on that day Exum had regular and valid process in his hands, authorizing him to take the property of the plaintiff, and it mattered not, though he professed to take under other, and void process. But, if they should be of opinion, that the property was taken upon the 28th of July, then the plaintiff would be entitled to recover, because the attachment, under which Exum professed to act, was void, and did not authorize him to take the property of the plaintiff, and it did not appear, on that day he had any regular and valid process; and because these defendants were both responsible for the acts of Exum, it appearing of record that they both, subsequently, acquiesced in these acts, the defendant Edmundson by the return of the attachment, and the other defendant, Britt, by accepting the return and prosecuting the said suit against the plaintiff; that, if they believed the plaintiff entitled to recover, the proper measure of damages would be the value of the goods at the time they were taken, deducting the value of goods, that came to the hands of Vass, Williams, and Moses Patterson by the consent of the plaintiff; that they might also allow such sum as they should think reasonable for the injury sustained by the plaintiff, by being deprived of the use of his property since it was taken; that, if they thought the circumstances of the case would justify them, they would be at liberty to give vindictive damages by way of punishment to the defendants; that they should make no

deduction for any of the goods appropriated by Exum to any purpose without the consent of the plaintiff, even though the same might have been appropriated to valid claims in his hands against the plaintiff.

The jury returned a verdict for the plaintiff. The defendants moved for a new trial for error in the instructions to the jury, and for the exclusion of proper evidence, and the admission of illegal testimony. Rule discharged, and a judgment: from which the defendants appealed to the Supreme Court.

Rodman, for the plaintiff.

J. H. Bryan, *J. W. Bryan*, and *Washington*, for the defendants, made the following points:

The return of Exum is not conclusive of the facts therein recited; they are acts "in pais" and not the acts of the court. *Smith* v. *Low*, 5 Ire., 197; 28 E. C. L. R., 423; 23 Wendell's Rep., 289.

The return was the act of Exum and not of Edmundson, the sheriff; it was a single, isolated act, and no evidence of itself against the sheriff. He was not the general deputy of the sheriff.

The damages should have been reduced by the evidence, that a portion of the goods were applied to *bona fide* attachments against the plaintiff. 2d Greenl. Ev., 278; *Coolege* v. *Choate*, 9 Mas. L. R.

Even if the sheriff had adopted the return of Exum, he would not have been liable for vindictive damages. *Hoyt* v. *Gelston*, 13 I. R., 141.

At common law, no one is a trespasser by relation, unless the trespass was done to his use or for his benefit, though he agree to the trespass after it be done. *Wilson* v. *Baker*, 24 E. C. L. R., 124; Co. Lit., 180, C. N., 4.

PEARSON, J. The court charged,—"that the defendants were both responsible for the acts of Exum, it appear-

ing, of record, that they both subsequently acquiesced in these acts—Edmundson by the return of the attachment, and Britt, by accepting the return and prosecuting the suit."

There is error, in holding Edmundson responsible for the acts of Exum, and giving to the return this conclusive legal effect. How far the superior is bound by the acts of the deputy is not the question; but it is, did Exum levy upon the goods of the plaintiff *as the deputy* of Edmundson? The original return, made by Exum, was a levy by him as constable. The county court permitted him to amend, so as to make it a return of a levy by Edmundson, as sheriff, by Exum his deputy. To this amended return is given the conclusive effect of a record, whereby it is established, that Exum made the levy as deputy, and consequently, that Edmundson is responsible in the same manner as if he had done the act himself.

In what light the question would be viewed, if Exum had been a regular and known deputy, without any other capacity, is not before us. The case states that he was a constable, who sometimes acted as deputy, but only when *specially deputized:* no express deputation is pretended, and, if he can be made a deputy at all, it must be, as an inference, from the fact of his assuming that character, in making the amended return. This was done after Edmundson went out of office, and he is not shown to have had notice of it. How the assumption in a single instance, without the knowledge of the principal, can conclusively establish the character assumed, so as to make the superior liable in trespass, we are not able to conceive. His Honor, it seems, gave to the return this conclusive effect, by treating it as a record, which imparts absolute verity. He was mistaken in his premises. A record states the acts of the court itself. The acts of a ministerial officer, as a constable or sheriff, in making returns on warrants and writs, although required by law to be returned into

a court of record, do not make a part of *the record*, are only *prima facie* taken to be true, and may be contradicted and shown to be false, antedated, &c. *Smith* v. *Low*, 5 Ire., 197. If such a return is not conclusive as to the acts, much less is it conclusive as to the character, of the person, who makes it in the name of a supposed superior.

The amended return, if evidence at all, was *at most* only *prima facie* evidence, that Exum was the deputy, and there are many circumstances tending to rebut it—he was a constable—never acted as deputy without a special deputation; he made the levy and the original return as constable, and the order allowing the return to be amended, was vacated by an appeal.

His Honor ought to have submitted the question to the jury, and it was error, to hold the fact conclusively established by the record. As the case will be tried again, it is proper to notice an error, on the question of damages. His Honor held, that the damages could not be abated in respect of the regular attachments, levied on the 29th of July, and under which a part of the property was subsequently sold, and the proceeds applied in discharge of the debts sued for. In this there is error. The levy created a *lien* on the property, and authorized the officer to retain an amount sufficient to satisfy the judgments, *without the consent* of the plaintiff. His Honor seems to have confounded this case where there was a lien, with that of an officer who sells under one execution, and claims a right to apply the excess of sales to a note or other debt, upon which there was no judgment, execution and levy—here there was a levy which created a lien. We give no opinion upon the subject of vindictive damages, because the case does not raise the question. The damages were $2,800, they are not stated to be vindictive, and for anything that is stated, it may be, that this sum was the balance of the value of the goods, after deducting the

sums allowed for the amounts, which, with the consent of the plaintiff, went into the hands of Vass, Williams, and Henry Patterson. These amounts are not given.

Per Curiam. Judgment reversed and *venire de novo*.

JOHN McPHERSON, et al. v. ALEXANDER McPHERSON, et al.

In the action of account there are two judgments; first, that the plaintiff and defendant account together; secondly, that the plaintiff or the defendant recover the balance found to be due from the one to the other.

In order to obtain the first judgment it is not necessary for the plaintiff to shew that the defendant is indebted to him as bailiff, &c. He need only shew that he is bound to account with him as baliff, or as a tenant in common, who has been in the pernancy of the profits, and the right to this judgment can only be barred by proof on the part of the defendant that he has already accounted, or by a denial, uncontradicted on the part of the plaintiff, of the existence of any such relation between the parties as gives the plaintiff a right to call for an account.

Where there are several tenants in common, some of whom have been in the receipt of profits and some not, each of the latter must bring his own action of account for what he claims—they cannot bring a joint action in the names of two or more to recover their several shares.

So where several tenants in common receive the profits, unless it can be shewn that they received them jointly as partners, an action of account cannot be brought against them jointly, but each must be sued separately.

If either of these cases appear upon the trial, the court will order a nonsuit.

Every tenant in common, who has been in the enjoyment of the property, is liable to account; and it is not material what was the mode of enjoyment, whether he used it merely for shelter, or as a means of supporting himself and family, or made money by selling the products, or received money as rent.

The case of *Powell* v. *Mathis*, 4 Ire., 83, cited and approved.

Appeal from the Superior Court of Law of Cumberland County, at the Spring Term, 1850, his Honor, Judge *Settle*, presiding.

This is an action of account, brought by the plaintiffs, alleging that the defendants were tenants in common with them of a certain tract of land, which had descended to them from a common ancestor, and received more than their proper share of the rents and profits, for which they had refused to account.

The proof was, that Alexander McPherson died more than twenty years ago, leaving his widow and eight children—all of whom had gone off and left their parents, except the three daughters, who, with their mother, remained on the land until 1836, when the defendant, Alexander, purchased a place of his own and moved off, leaving his sisters still there.

It appeared, that in the year 1841, Mrs. McPherson died: That in 18—, Mrs. Rhodes, formerly Margaret McPherson, died, leaving a husband, and several children surviving her: that in the year 1838, Hugh, one of the brothers, died intestate, and without issue, or ever having been married: that in the year 1839 Neill, one of the brothers, released all that interest in the land which he had acquired by descent from his father, to his two sisters the defendants, and that, by a deed without date, and it did not appear when made, he released his interest as heir-at-law of his deceased brother Hugh, to one of the plaintiff's; that in the year 1831, Martin McPherson released his interest as heir-at-law of his father, to his sisters, the defendants, but it did not appear that he had ever released his right as heir-at-law of his deceased brother Hugh. It also appeared that Rhodes, the husband of Margaret, died in 1848, pending this action, and that his administrator was made a party plaintiff in his stead.

The defendants denied that they were the tenants in common of the plaintiffs or that they were their bailiffs; and also pleaded and relied on the statute of limitations. They further objected to the plaintiffs' recovery, upon the ground, that although one tenant in common may maintain

an action of account, for his separate share, against any one or more tenants in common, who jointly receive more than his or their share of the rents and profits of the common property; yet he cannot bring a joint action against several cotenants, who, without any concert, each takes more than his share of the common profits. Again, the several tenants in common cannot join in a common action against several other tenants in common, without some contract, whereon to have such an action. And again, that if several tenants in common may join in an action against several others, who occupy the property, all the tenants in common, out of possession, must join in such action against those in possession, and that, in this case, Martin McPherson, who has clearly not parted with his interest as heir of his brother Hugh, and Neill, who had not been proven to have parted with his interest before the bringing of this action, were not parties. It was further objected, that the mere perception of the products of the land, not turned into money by sales, by one tenant in common, would not enable his cotenant to maintain the action against him. It was further objected, that Rhodes and his administrator were not the proper parties in this action. It was further objected, that no demand had been made before bringing the action.

His Honor charged, that if the defendants, or any of them, had received more than their share of the profits of the land either in money or fruits of the earth or otherwise, within three years before the bringing of this action, the plaintiffs were entitled to their verdict: That merely living and breathing on the land would not subject the defendants to account, if they did not exclude the plaintiffs from a like enjoyment: Nor would the use of no more than their proportionate share of the land in any way subject them. But if they used more than their own share of the land, and derived anything from such use, they would be liable.

The plaintiffs' counsel then asked the court to charge the jury, that, if one of the defendants was seen bringing wood from the land to market apparently to sell, and the jury believed it was so sold, the defendants would be liable. His Honor declined so charging, but said, unless it appeared that the defendants or one of them had received more than his own share, the action would not lie.

A verdict being rendered generally for the defendants and judgment rendered thereon, the plaintiffs appealed.

Banks, with whom were *Mullins*, *W. Winslow* and *Kelly*, for the plaintiffs, submitted the following argument:

Three several and distinct technical objections are raised by the defendants' pleadings; either of which, it is contended, will prevent the plaintiffs obtaining a new trial, notwithstanding there may be error in the judge's charge.

It is said, 1st. There is a *non* joinder of plaintiffs. 2nd. There is a *mis* joinder of plaintiffs. 3rd. There is a *mis* joinder of *defendants*.

On the *first* point. It is contended by the defendants, that Martin McPherson should be a party plaintiff, and that the non-joinder is cause of nonsuit.

On the part of the plaintiffs, it is admitted that the non-joinder of a party, who *ought* to sue, "is fatal on demurrer, or on motion in arrest of judgment; or on error; or by plea in abatement; or as a ground of nonsuit on the trial; *as a variance* upon *non est factum*, if the action be a *specialty;* or, if it be upon any other contract, upon the plea of "general issue."" 1 Chit. Pl., 14.

In this cause there has been *no* "*demurrer*," *no* "plea in *abatement*." The action is *not* upon a *specialty*. Hence the defendants cannot claim the benefit of a *variance*. *They* have *obtained judgment*, and neither wish to *move*

for its *arrest*, or to have vacated for "error," and could not, if they would—the plaintiffs being the appellants.

This narrows the question down to one single point—*Can* the plaintiffs in this action be *non suited*, on the plea of "*general issue?*" It is submitted they cannot for the following reasons:

In an action of *account*, there is no "*general issue.*" 1st Chitty's Pl., 524. In an action of *account*, there is not, and never was any "*general issue.*" Pulling on Mercantile Accounts, 120, 121.

It is submitted further, that as Martin McPherson was *unwilling* to *join* in the action as plaintiff, there was no process of compulsion: and he could not be sued as a defendant, because the evidence shows he was not in possession.

The following cases are submitted, as authority to justify the positions assumed.

"A. alone, declared against B. as bailiff of 3. It was held good; for perhaps A., only, entrusted his share to B. 1st Comyns Digest Accompt., 122, E. 12. 1st Viners Ab., sec. 20, 145."

Again—"In an action of account by A. against the defendant as bailiff of *one;* it appeared by the plaintiff's own shewing, he was bailiff of *two*. It was held good, for there was no *repugnancy* in the *counts*, and it might be *mischievous*, if one tenant in common could not have his action, without the other joining." Cro. Jac., 410; 1 Vin. Ab., sec. 7, 176.

There is no *repugnancy* in the *count*," for if he was "tenant in common" and bound to account with *three*, so is he bound to account with *two*.

To the *second* objection, viz.: That there is a *misjoinder* of plaintiffs—the suit being in the name of *two*—when only *one* should have sued.

It is insisted by the plaintiffs, that "tenants in common," may in this action sue jointly, or severally, at their

option; and it is contended, that, in cases of misjoinder, *if* the objection *appear* on the face of the pleadings, advantage of it can only be taken "by plea in abatement," "demurrer," "motion in arrest of judgment," or by "writ of error." 1st Chitty Pl., 484; 1st Saunders Pl., Ev., 14. In this case the *objection* of misjoinder *appears* upon the pleadings, and, as *neither* of the above remedies can be applied to this case, it follows that the second objection fails, as the statute of *jeofail after verdict cures defects.* It is admitted, that *in cases of misjoinder*, "if the objection do *not* appear upon the plaintiffs' pleadings, it will be ground of nonsuit at the trial." 1st Saunders Plead. Ev., 14.

In North Carolina, tenants in common, (contrary to the rule in England) may recover in an acttion of ejectment on a *joint* demise. *Nixon* v. *Potts*, 1 Hawks, 462. Two or more tenants in common may recover in an action of ejectment, though one or more may be omitted. *Bronson* v. *Paynter*, 4 Dev. &Bat., 393. From which a rule may be deduced: "that tenants in common may sue jointly or severally at their opinion."

But there is a *third* objection. The misjoinder of defendants. The declaration being against *three jointly*, and the proof is they are tenants in common, seized, *as is said*, according to their interest in severalty.

It is submitted by the plaintiffs in reply to this objection: that the *three* tenants in possession are seized *per my et per tout;* not simply for their own benefit, according to their own interest, but they are *jointly seized* for the benefit of those who are out of possesson, as well as for themselves. And as the possession of the *three* is the possession of the whole, they should, *as a whole*, account with those for whom they hold.

That co-bailiffs may be called to account, see 1st Petersdorfs Ab., 100; 3rd Wilson, 73 to 118.

But it is said the following rule is inflexible—"If too many persons be joined as defendants, in an action on a contract or specialty, if the objection do *not* appear on the plaintiffs' pleadings, the plaintiffs may be nonsuited at the trial, or, if the objection *appear on the pleadings*, the defendants may demur, move in arrest of judgment or bring error." 1st Chitty, 50; 1st Saunders Plead. and Ev., 14.

It is submitted, that if an objection exists at all, it *appears on the pleadings*, and yet the defendants have neither *demurred*, moved in *arrest* of judgment nor craved a writ of *error*. In failing to do so, they have waived the advantages prescribed in the rule. It is clear, they cannot claim the benefit of a *variance*, for the action is not on a *specialty*. On this point as on the first, they must rely on the plea of "general issue," and we have before endeavored to show that there is no such plea, the pleas being all special.

If, however, the court shall be of opinion, that tenants in common should *account severally*—and is of the further opinion, that in an action of account there *is* a *plea* of "*general issue*"—then and in that event, it is admitted the plaintiffs should be nonsuited, unless the act of 1789, Rev. Stat., chap. 31, sec. 89, includes this case.

The construction of this statute, *hitherto*, has been, that where *several* were sued *jointly*, the judgment might be several. *Brown* v. *Clary*, 1 Hay., 107; *Davis* v. *Wilkinson*, 1 Hay., 333; and in *Sharp* v. *Jones and Winborne*, 3rd Murphy, 306, the Court uses the following language:

"It has been decided in this Court, that under the broad expressions of the act of 1789, if an assumpsit be brought against two, the jury may find *against one*, and in *favor* of the *other*, thus *severing* by their *verdict* a *joint contract*, upon which the suit was brought."

It is therefore insisted that the *equity* of this statute may well be extended to "tenants in common," especially

in the action of account, which possesses equitable features—an action in which there are two judgments, the last of which is *predicated* upon the question, *submitted* to the *auditors*, "*Who is in arrears?*" and, in answering this question, they are at liberty to find a *surplusage against* the plaintiffs, or a balance in their *favor*, as the case may be. 1st Selw. N. P., note, page 9, 1st Arch'd N. P., 212; 1st Vin. Ab., 167.

A bill in equity is a "mere substitute for the action of account." *Wagstaff* v. *Smith*, 4 Ire. Eq., 1.

From this it follows, equity and law have concurrent jurisdiction, and the same rule for entering up judgment should prevail. 2 Bur., 1077; Pulling on Mercantile Accounts, 124.

The plaintiff thinks the correctness of these several propositions will be illustrated by a brief analysis of the form of the action, and an abstract of the reasons assigned for a new trial.

At common law the action of *account* lay *only* against a "guardian in socage," bailiff, or receiver, and in favor of trade between merchants. Bul. N. P., 127; 1 Arch'd N. P., 196; 1st Selw. N. P., page 1; 1st Bac. Ab. Account (A).

But by statute 3 and 4th Anne, ch. 16, re-enacted Rev. Stat., chap. 21, sec. 104, the action is extended to tenants in common, and one may sue the other "*as* bailiff," for receiving more than comes to his just share and proportion.

In this action there are two judgments—the first is a mere interlocutory rule—"*quod computet.*" The cause is then referred to auditors, on the question, "*Who is in arrears?*" *Saunders* v. *Godfrey*, 3 Wilson, 88; 1st Selw. N. P., (note) page 9.

The parties come to an *issue* on the *account*, before the auditor. The court cannot intermeddle in the account, until the auditors report. They may find a surplusage

in favor of the defendants, as well as a balance against them, but if the defendants be found in arrears *before the auditors* (and no exceptions are filed and sustained,) the plaintiffs shall have final judgment, "*quod recuperent.*" 1st Vin. Ab., sec. 13, 172; sec. 24, 174, 167 and 168; 1st. Arch'd N. P., 212.

The reason why it is necessary for the plaintiffs to aver in their declaration, that they are "tenants in common," and the "defendants have received more than their share of the profits," is, that the *auditors*, who are *jndges of record*, and take notice of the *pleadings*, may learn *therefrom*, that the action is brought under the statute, and not at common law, and that the defendants are only liable for the *actual profits*, and not those they might have made, and for the further reason of notifying them, that, under the statute, the plaintiffs are entitled to the defendants' oath, which they are not entitled to at common law; and lastly, that they may allow to the defendants all reasonable costs and charges incurred in the management of the estate. *Wheeler* v. *Horne*, Wills. Rep., 210; 3 Chitty's Pl., 1297–8, (Declaration); 1 Com. Digest, 127, E. 12; 1st Viners Ab., (T.,) sec. 3.

The auditors are empowered to "administer an oath," and examine the parties touching the *matter* in question, and we know of no plea that can be *pleaded before a jury* in this action, which *puts* in *issue*, whether the defendants have received *more* than their share of the profits or not; hence there is *no* "general issue." 1 Bac. Ab., Note, Account, (D); Rev. Stat., ch. 31, sec. 104; 1 Chitty Pl., 524; 3 Chitty Pl., 1298.

As the *jury* can award no amount, nor assess any damages, why should evidence to that effect be required? The action is for the *account*, not the *amount* due. Before the amount can be had, a privity of relation must be shewn to exist, and it would be gross injustice to *compel* a plaintiff to make out his case before a jury—when by the form

of action selected, he in effect admits his inability to do so, without the *oaths* of the *defendants before the auditors.*

As between tenants in common, Littleton says, "*No man* can certainly tell which *part* is his own." Blackstone says, they "*occupy promiscuously*," "because *none* knoweth his own severalty," and it may be added, if each one could tell his own part, "*account*" would not lie because the "action does not lie for a sum certain." 1 Bac. Ab., C. and D.

The receipt of the whole profits, by one tenant in common, imposes an immediate liabi ity to account, and the statute of limitations does not begin to run, so long as there is a common possession. *Wagstaff* v. *Smith*, 4 Ire. Eq., 1 ; *Northcote* v. *Casper*, 6 Ire. Eq., 303.

It is therefore contended, that, in the trial of this cause, the *only material question in issue*, before the *jury*, was, "are the parties tenants in common ?" and it is alleged as error, that the judge in his charge *passed over this* "*preliminary*" *point* "*to get at another*," *subsidiary* and *secondary thereto*. *McNeill* v. *Massey*, 3 Hawks, 100.

Whether the *points reserved* be for or against the plaintiffs, it is submitted they are entitled to a new trial upon the points, on which they appealed, "as the attention of *this* Court is more properly given to such *errors* as are *alleged* by the *party who appeals.*" *Norwood* v. *Marrow*, 4 Dev. & Bat., 447.

Strange, for the defendants.

Pearson, J. The judge, in the court below, was of opinion, that in the action of account against the defendants, who were tenants in common with the plaintiffs, and were sued as bailiffs under the statute, for using more than their just share, in proportion, of the profits, it was necessary for the plaintiffs to prove to the satisfaction of the jury, not only that the defendants were tenants in com-

mon with the plaintiffs, and had been in the pernancy of the profits, but that they had received more than their just share or proportion. To this the plaintiffs excepted. We think there is error.

The action of account is peculiar, for in it there are two judgments: in the first place, there is judgment that the plaintiff and defendant account together, and in the second place, that the plaintiff *or* defendant recover the balance found to be due.

The first judgment, like an order of reference to the clerk to take an account in equity, merely decides, that the plaintiff is entitled to an account; it can only be barred by proof that the defendant had already accounted, or by a denial, uncontradicted by proof on the part of the plaintiff, of the existence of any such relation between the parties, as gives the plaintiff a right to call for an account.

To require, as a preliminary question before the first judgment is given, that the plaintiff should prove *to the jury*, that the defendants have received more than a just share of the profits, is totally inconsistent with the nature of the action, for three reasons: 1st. It will require the plaintiff to prove to the jury the very thing that is to be decided by the auditor, and leaves nothing for him to do. 2nd. It will require the jury to investigate and decide matters of account, which the mode of proceeding in this action presupposes a jury is incapable of doing. 3rd. It will deprive the parties of the right given by the statute, of an examination on oath touching the matters in question.

Every tenant in common, who has been in the enjoyment of the property, is liable to account, but no recovery can be had against him, unless, upon taking the account, it is shown that he has received more than his just share. The mode of enjoyment is not material. It makes no difference, whether he uses it merely for shelter and as a

means of supporting himself and family, or makes money by selling the products, or receives money as rent; in either case he is bound to come to an account with his fellows, and can only avoid it, by averring, and proving, that he has already accounted.

The defendants' counsel earnestly contended, that it was a hardship, to be subjected to a judgment to account, without proof *in the first instance*, that more than a just share had been received, and that no tenant is safe in taking possession, if, by doing so, he subjects himself to the trouble and expense of an account. We are unable to perceive the force of the argument. If a bill is filed against an executor, or an agent, or a tenant in common, who has been in the perception of the profits, it would be strange, if the plaintiff was required, in the first instance, to prove that the defendant is in arrear. That is the very question to be settled by taking the account, and, if the plaintiff fails to establish it before the master, he pays the costs of the suit.

We think, therefore, there is error in the part of the charge excepted to by the plaintiffs, but it is apparent from the case, that they have not been prejudiced by the error. The part of the charge excepted to is a restriction or qualification of a general proposition, that the plaintiffs were entitled to recover. There is manifest error in this general proposition, in favor of the plaintiffs, and of course an error in the restriction or qualification of an erroneous proposition would work no prejudice. The charge ought to have been, that the plaintiffs were *not* entitled to recover; this would have cut off the question raised by the exception.

The action is fatally defective, by means of a misjoinder, both of plaintiffs and defendants. The plaintiffs declare, not upon an express understanding with them jointly, but upon the implied understanding raised by the statute. Now the interest of tenants in common is several,

and of course this implied understanding with them must also be several—so their right of action is not joint, and there are too many plaintiffs, which is a fatal variance. In regard to the defendants, there is no proof that they received the profits jointly as partners. Each received portions of the profits severally, and therefore they cannot be sued jointly, for in that case each would be bound for the whole judgment, and, if the defendant, who had received the greatest share, happened to be insolvent, the burthen would fall on the others. The principle is the same, as that applicable to co-sureties. If one of them pays the debt, he cannot, at law, sue the other two jointly, for each is only liable for his aliquot part, and to allow a joint suit, would be to subject one to the whole recovery, altho' his fellow may be insolvent. *Powell* v. *Mathis*, 4 Ire., 83. It was ingeniously argued for the plaintiffs, that there was no plea under which advantage could be taken of the defect of parties, and he cited a passage, 1 Chitty, 14, where it is said, "a variance, in respect to parties, can only be a ground of nonsuit, under the plea of *non est factum*, in debt on specialty and covenant; and the general issue in all other actions." It is clear, Chitty has no reference to the action of account, which he considers obsolete, and therefore does not treat of it—and in which, like covenant, there is properly speaking no ge eral issue. As in the latter the variance may be taken advantage of, under *non est factum*, so in the former, it may be done, under the plea, that the defendants are not the bailiffs of the plaintiffs, in the manner alleged in the declaration. Both of these pleas deny the relation between the parties as alleged, and if, upon the trial, there is a variance between the *allegata* and the *probata*, it is ground of nonsuit; if the plaintiffs will not submit to a nonsuit, the Court must instruct the jury to find for the defendants.

Per Curiam. Judgment affirmed.

THOMAS C. BRICKHOUSE, Adm'r v. JAMES BRICKHOUSE.

Trover will lie for promissory notes, by the administrator of the payee, against a donee by oral gift, though the gift be accompanied by delivery.

A recovery in trover for a note or bill and payment of the damages divest the property out of the plaintiff, and, indeed, vest it in the defendant, as between him and the plaintiff.

In actions by administrators, the letters of administration, granted, as they are, by a domestic tribunal of exclusive jurisdiction, and remaining unrevoked, are *prima facie* evidence of the death of the alleged intestate and of the right of representing him.

The case of *Fairly* v. *McLean*, 11 Ire., 158, cited and approved.

Appeal from the Superior Court of Law of TYRRELL County, at the Fall Term, 1850, his Honor, Judge *Caldwell*, presiding.

The action is trover for three promissory notes, made by third persons, and payable to Joseph Brown, the intestate of the plaintiff, and amounting, together, to the sum of $175. On the trial upon the general issue, the defendant set up title to the notes under a gift from Brown; and he gave evidence, that, about the 1st of Nov., 1848, he, Brown, being about to sail on a voyage to the West Indies, delivered the notes to the defendant, (who was his uncle) saying to him, "If I never return, these notes are to be yours." Brown proceeded on the voyage at the time mentioned, and, at the time of trial, in September, 1850, he had not returned, nor had he, or the vessel, in which he sailed, ever been heard of, and it was the general belief, that they were lost on the voyage.

The counsel for the defendant thereupon insisted, that the evidence, if believed, established a gift of the notes

to the defendant by the intestate, to take effect in the event the intestate should not return; and that for that reason the plaintiff could not recover. And he further insisted, that the evidence, if believed, established a bailment of the notes to the defendant, to be kept by him for the payee Brown, until he should return home, and that the same had not been determined, and that, for that reason, the plaintiff could not recover. But the court refused to give these instructions, and, after a verdict, and judgment for the plaintiff, the defendant appealed.

P. H. Winston, Jr., for the plaintiff.
Smith, for the defendant.

RUFFIN, C. J. The recent case af *Fairly* v. *McLean*, 11 Ire., 158, is an authority in point, that the right to property in the notes could be transferred only by endorsement and delivery, and that trover will lie for them by the administrator of the payee against a donee by oral gift, though accompanied by delivery. The doctrine is well settled. Bayley on Bills, 18; Story's Prom. notes, S. 120. No point was made at the trial about a demand by the administrator, so as to render the detention of the notes wrongful, and it must therefore be assumed, that the defendant refused to deliver them up and claimed to keep them as his legal property under the gift, conditional or absolute, which he set up, which is a conversion, and renders the defendant liable in this action, provided the notes belong to the plaintiff, as administrator. It was said, indeed, at the bar, that, if the notes cannot pass to the defendant but by endorsement, it is thereby established that trover will not lie for them, as it is incident to that action, that a recovery therein of the value and satisfaction thereof vest the property, in the thing converted, in the defendant. That may be generally true, but it is by no means universally so; since trover often lies for a conversion by the destruction of a thing. It is, moreover,

well settled, that trover will lie for a bond or note, although the former be not the subject of transfer at all; and further, that a recovery in trover for a note or bill and payment of the damages divest the property out of the plaintiff, and, indeed, vest it in the defendant as between him and the plaintiff. *Holmes* v. *Wilson*, 10 Ad. and E., 511.

It is said, however, that the action does not lie, because, according to the terms of the bailment, it has not been determined by the return of the bailor. But his death determines the bailment, unquestionably, so as to make the property, which was in him, vest in his administrator. What the defendant held for the intestate at the time of his death, he held, after that event, for the plaintiff as administrator. But it was argued, that it did not sufficiently appear, that the bailor was dead. The circumstances constituted evidence on which the jury might have found that person's death, were it necessary that the plaintiff should have directly established it. But, in actions by administrators, the letters of administration, granted as they are, by a domestic tribunal of exclusive jurisdiction, and remaining unrevoked, are *prima facie* evidence of the death of the alleged intestate and the right of representing him. *Moons* v. *DeBernoles*, 1 Russ., 301.

PER CURIAM. Judgment affirmed.

COOK and TAYLOR v. JOHN A. ARTHUR.

The assignment of a covenant for the delivery of staves does not, at law, transfer the interest in the covenant.

Where in a suit by A. and B., copartners, against C., he pleaded, that in his garnishment on an attachment against A., one of the present plaintiffs, he had admitted that he owed A. the sum for which he is now sued, and he had paid the judgment rendered against him on the garnishment; *Held*, that this plea did not avail him, for he had confessed a debt due to A. alone, being different from that to A. and B. now sued on.

The effects of a firm are not subject to attachment for the separate debt of one of the partners.

The case of *Jarvis* v. *Hyer*, 4 Dev., 367, cited and approved.

Appeal from the Superior Court of Law of BEAUFORT County, at the Spring Term, 1850, his Honor, Judge *Bailey*, presiding.

The action was brought in May, 1848, and is covenant on an agreement under seal, dated June 7th, 1845, whereby the defendant obliged himself to deliver in Beaufort county, 50,000 red oak hogshead staves, on or before the 1st of December, 1845, to the plaintiffs, Cooke & Taylor, who were partners, and merchants in New York. The defendant pleaded covenants performed, and a foreign attachment in the superior court of Beaufort, commenced on the 14th of April, 1846, by Vannostrick & Cogdell, against the estate of John Moore Taylor, one of the present plaintiffs, on the bill of exchange for $1,100, in which the defendant was summoned as a garnishee, and upon his garnishment, in April, 1846, confessed (amongst other things) that in June, 1845, he gave to said Taylor his obligation to deliver to him 50,000 red oak hogshead staves, and stated that he

had delivered 26,713 of them, and that the remaining 23,-227 had not been delivered, but remained due to the said Taylor; and that, before the present suit was brought, judgment was rendered in the attachment against Taylor, and the value of the 23,227 staves was condemned in the hands of the defendant, and by him paid in part satisfaction of the recovery against Taylor.

On the trial, the defendant gave evidence, that, in a few days after the execution of the covenant, Taylor, in the name of Cook and Taylor, made an endorsement thereon in writing in these words, "Deliver the within to Messrs. Freeman & Houston;" but the witness stated further, that Freeman and Houston had no interest in the transaction, and that the order was given to them to enable them to receive the staves for Cook & Taylor, and that, under it, they did receive nearly 27,000 between December, 1845, and May, 1846, for them. The defendant also gave in evidence the record of the attachment pleaded by him; and the garnishment and judgments therein appeared to be as pleaded. And thereupon the defendant moved the court to instruct the jury, that the plaintiffs could not recover; first, because they had extinguished their right by the transfer to Freeman and Houston; and, secondly, because the proceedings in the attachment were a bar to this action. The court refused to give either instruction, and told the jury the plaintiffs were entitled to damages to the value of the staves not delivered. The plaintiffs had a verdict and judgment, and the defendant appealed.

No counsel for the plaintiffs.

Donnell and *Rodman*, for the defendant.

RUFFIN, C. J. The judgment must be affirmed. The covenant was not negotiable, and the assignment could

have no effect on the legal right to sue on it, if it had been so intended. But there was no such intention. The purpose was merely to make Freeman and Houston the agents of Cook and Taylor, so that they might accept the staves on behalf of the owners. Nor does the attachment help the defendant. The garnishment stated an indebtedness to Taylor, the sole defendant in the attachment, on an obligation to deliver staves to Taylor—being a different instrument from that to Cook and Taylor now sued on. The difference is not formal merely, but essential to the rights of the parties, as the liability of the garnishee depended on it; since the effects of a firm are not subject to attachment for the separate debt of one of the parties. *Jarvis* v. *Hyer*, 4 Dev., 367.

PER CURIAM. Judgment affirmed.

JAMES B. MARSH v. WILLIAM N. BROOKS.

Although a bill or promissory note may be made payable to A. B. or bearer, yet a bond cannot. That being a deed, it must be made to some certain obligee, to whom it may be delivered.

After the bond has become a perfect instrument, the obligee can, by indorsement, order the payment to be made to the bearer, for, in respect to their transfer, notes and bonds are put on the same footing. But their nature, in their inception and before endorsement, is not touched by the statute and remains as at common law.

The case of *Fairly* v. *McLean*, 11 Ire., cited, explained and approved.

Appeal from the Superior Court of Law of BEAUFORT County, at the Fall Term, 1850, his Honor, Judge *Ellis*, presiding.

The declaration is in debt on a single bond for $325.05, payable to Ezekial Midgett, or bearer, and on *non est factum* pleaded the defendant objected to the recovery by the plaintiff as the bearer, because the bond was not delivered to him, nor was it a contract with him. Of that opinion was the presiding judge, and the plaintiff submitted to a nonsuit and appealed.

Rodman, for the plaintiff.

Biggs and *Shaw*, for the defendant.

RUFFIN, C. J. The judgment must be affirmed. Although a bill or promissory note may be made payable to A. B. or bearer, or to the bearer, yet a bond cannot. That being a deed, it must be made to some certain obligee, to whom or for whom it may be delivered. In that respect it is like other deeds, which cannot be effectually made to the bearer, that is, to any person who may happen to come into possession of them. There are essential differences between notes and bonds in many respects. The former for instance can be made in blank as to the sum, the payee, the time of payment, and the like, and may be filled up by any person duly authorized, though orally; while a bond must be complete from the beginning in all those respects. The plaintiff cannot sue on this bond, because he is neither named in it as the obligee, nor is it transferred to him by the obligee named. If it be a bond at all, it is so as being payable to Ezekial Midgett, and the words "or bearer," are unmeaning, and may be rejected as surplusage. That is supposed to be very clearly the law; and then no person can claim the bond but by the assignment of Midgett under the statute. The plaintiff must, then, fail, for want of evidence of a delivery to Midgett, or to any one for him, and also for want of Midgett's endorsement. It was argued, that the effect of the statute, making bonds negotiable, and transferable

by endorsement, in the same manner as promissory notes, must be to allow this form of a bond, that is, payable to bearer or to A. B. or bearer. But that consequence can by no means follow. On the contrary, the instrument must be a perfect bond before it can be negotiated; for, it is only as a bond for money, that it is susceptible of transfer, and then it is by endorsement. No doubt, after it has become a perfect instrument, the obligee can, by his endorsement, order the payment to be made to the bearer; for, in respect to their transfer, notes and bonds are put on the same footing. But their nature, in their inception and before endorsement, is not touched by the statute, and remains, as at common law. The counsel for the plaintiff relied also on the case of *Fairly* v. *McLean*, 11 Ire., 158, as an authority for the validity of such bonds, and that they enure to the benefit of the bearer. But that is a mistake, for the Court then gave no opinion on the question, and could give none. The action was brought for three bonds, of which two were payable to the intestate and the other to him as bearer; and in the superior court, it was held, that all three vested in the son by the gift and delivery from the intestate, and yielded the point as to the one payable to him or bearer. The question now under consideration was, therefore, not open to the Court upon that occasion, and that case cannot affect the present.

PER CURIAM. Judgment affirmed.

THE STATE to the use of JUSTICE B. JONES v. JOSEPH D. BIGGS.

The official returns of a guardion to the county court of the state of his account with his ward are admissible evidence, in an action against the clerk of the county court for neglect of duty in not issuing a *scire facias*, as required by law, to cause the guardian to renew his bond.

The cases of *Armistead* v. *Harramond*, 4 Hawks., 339, and *Governor* v. *Twitty*, 2 Hawks., 5, and 1 Dev., 153, cited and approved.

Appeal from the Superior Court of Law of BEAUFORT County, at the Spring Term, 1850, his Honor, Judge *Bailey*, presiding.

The action is debt on the bond, given by the defendant as the clerk of the county court of Martin, and the breach assigned is, in not issuing a summons to one Redding from January term, 1838, to renew his bond, as the guardian of the relator—to which office he was appointed at January term, 1836, and in virtue thereof received large sums of money and other effects, belonging to the relator, by reason whereof and the subsequent insolvency of the guardian, the relator sustained damages from the loss of the money and other effects. The defendant pleaded, conditions performed and *non damnificatus;* and, on the trial, the relator offered the returns made to the county court, by the guardian, of the estate of the ward in his hands in January, 1835, and thence from time to time to 1840, as evidence of the amount of the estate, and of the amount of damage sustained by the relator from the insolvency of the guardian and alleged omission of the defendant. But, upon objection on the part of the defend-

ant, his Honor rejected the evidence, and the relator submitted to a nonsuit and appealed.

Rodman, *J. W. Bryan* and *J. H. Bryan*, for the plaintiff.

Biggs, for the defendant.

RUFFIN, C. J. The Court is of opinion, that the evidence was improperly excluded. The returns of the guardian stand on the same footing with an inventory by an administrator, which has been repeatedly held to be admissible to charge the administrators' sureties, at the instance of creditors or next of kin. *Armistead* v. *Harramond*, 4 Hawks., 339. They are acts required by the law from those persons in the discharge of their official duties, as a mode of charging them upon their own oaths, contemporaneously with their getting the effects in hand or nearly so. They establish the indebtedness of the administrator or guardian, at least *prima facie*, and are much like the return of satisfaction by a sheriff, whereby his sureties are bound. *Governor* v. *Twitty*, 2 Hawks., 5, and 1 Dev., 153. These returns constitute natural evidence, arising out of the ordinary course of business, to charge the guardian, and therefore, they tend to shew the extent of the relators' loss by the subsequent insolvency of the guardian, and by consequence, of the damages which by possibility arose from the *laches* of the defendant. It is not like an indebtedness established by judicial sentence, which is *in invitum*. But this is the party's own act against his interest, done not only in the ordinary course of business, but in the most solemn manner, in the prescribed course of official duty.

PER CURIAM. Judgment reversed and *venire de novo*.

JOHN A. ANDERSON v. LEMUEL R. JERNIGAN.

A reference to the clerk of the court to take and report the accounts of an executor, administrator or guardian, can only be made, under the act of 1826, Rev. Stat., ch. 31, sec. 119, in a suit brought upon the bond given by such executor, administrator or guardian for the faithful performance of his duty.

The case of *Lynch* v. *Johnson*, 11 Ire., 224, cited and approved.

Appeal from the Superior Court of Law of HERTFORD County, at the Fall Term, 1850, his Honor, Judge *Caldwell*, presiding.

The suit was commenced by warrant in debt on a former judgment for $45.66, and, on the trial, the defendant suggested the want of assets to the magistrate, who endorsed the suggestion on the warrant, and gave judgment for the plaintiff for the debt demanded and interest and costs, and returned the proceedings to the county court. The defendant appeared and pleaded, no assets, and *plene administravit*, and issue was taken thereon. By the consent of the parties an order was then made, referring it to the clerk to take and state an account of the personal estate of the intestate, in the hands of the defendant, or for which he ought to be liable to the plaintiff in this suit. The clerk made his report to the next term, by which it appeared that the defendant had fully administered, and that a small balance was due from the estate to the defendant. The plaintiff took several exceptions to the report, which were overruled; and then the court confirmed the report, and the plaintiff appealed to the superior court. In the lat-

ter court his Honor overruled all the plaintiff's exceptions but one. That he allowed, and, by doing so, the balance of the account was changed so as to make the defendant debtor to the estate of his intestate in the sum of $7.60; and, for that sum and the costs, there was judgment against the defendant, from which he appealed.

B. F. Moore and *Barnes*, for the plaintiff.
Bragg and *Smith*, for the defendant.

RUFFIN, C. J. The reference was not to the clerk as an arbitrator. The parties did not treat the report as an award and it is plain, that it was not so intended to be. The purpose was to proceed under the act of 1826, upon the supposition that the case was within it, as was done in *Lynch* v. *Johnson*, 11 Ire., 224, and there held to be erroneous. Issues were joined in the record for the jury, and there has been no trial of them; consequently the judgment, thus rendered without a verdict, must be reversed, and the cause remanded for further proceedings according to law.

PER CURIAM. Judgment reversed and cause remanded.

WILLIAM ADKINSON v. SAMUEL W. SIMMONS.

Under the book debt law, Revised Statutes, chapter 15, in order to entitle the party to recover, he must swear, not only that he "sold," but also that he actually "delivered," the articles for the price of which the suit is brought.

Appeal from the Superior Court of Law of BERTIE County, at the Fall Term 1850, his Honor, Judge *Caldwell*, presiding.

This is a warrant for a sum due by account, and the claim of the plaintiff is for the price of 5 stacks of fodder, sold and delivered. Plea, non-assumpsit; and on the trial in the superior court, the plaintiff proposed to prove his demand under the book debt act. On being sworn, he stated, amongst other things, that he purchased five stacks of fodder from a neighbour, and that the defendant knew of the purchase and knew the fodder; that a few days thereafter the defendant and he met at a place, about seven miles from the fodder, and the former proposed to purchase it, and the plaintiff offered to take $2.85 per stack for the whole; that the defendant wanted time to examine the fodder, but the plaintiff told him, that he must either agree then to take it, or he could not have it at all, as he, the plaintiff, must sell it or move it, and he wished to have no further trouble with it; that thereupon the defendant said, "I will take it," and the plaintiff replied, "then it is your fodder," to which the defendant said "yes." The plaintiff further stated, that he did not know that the fodder ever went into the defendant's possession, or that he ever exercised any dominion over it.

On that statement the court refused to admit the plaintiff's book in evidence, and held that the plaintiff could not recover, and from a judgment against him he appealed.

Smith, *Winston*, *Jr.*, and *Bragg*, for the plaintiff.
A. Moore, for the defendant.

RUFFIN, C. J. The book was properly excluded, and there was no evidence competent to establish the demand. Although assumpsit may lie for the price of goods bargained and sold, yet it must be sustained by disinterested witnesses. It is only in suits for "goods sold, and delivered," that the plaintiff and his book are made competent by the statute. The act is express upon that head. It repeats more than once, that the delivery is to be proved, saying, that if the plaintiff will declare on oath, that he hath no means "to prove the delivery of such articles" as he professes to prove by his own oath but by his books; and also, that the articles contained in the book, and by him so proved "were *bona fide* delivered;" then, the book and oath shall be received, "as good evidence for the several articles so proved to be delivered." Rev. St., ch. 15. It is clear, therefore, that there must be a *bona fide* or actual delivery established by the party's oath, before he can recover on the evidence of his oath and book; and the reason seems manifest. It is to lessen the danger of perjury, by the departure from the rule of the common law, whereby a party was excluded from being a witness for himself. For, there would be great danger in allowing one to prove for himself special agreements for sales, unaccompanied by acts, openly denoting the change of property. It is a wholesome provision, therefore, that the oath, as to the contract of sale, should be corroborated by the further oath of the party to the delivery of the thing

since, if false, the falsehood in the latter point is much more open to detection than in the former, and in the same proportion the temptation to perjury and its frequency are diminished. There was not only no delivery in this case, but the defendant, not having paid or tendered the price, was not even entitled to the possession. 2 B. Com., 448.

PER CURIAM. Judgment affirmed.

WILLIAM D. SMITH v. JOSHUA BRYAN.

Where A. brought an action to recover the amount of a bill of exchange, which he had drawn on B. in favor of C., and which had been accepted by B. and afterwards come into the possession of A. without endorsement; *Held*, that A. could not recover on a count on the bill, because it had not been endorsed to him; and that he could not recover on a money count, without shewing either that the bill had been endorsed to him or in blank, or that he had been obliged to pay the money in consequence of his liability as drawer, or that they had accounted together and the acceptor been found indebted to the drawer in the amount of the bill.

Appeal from the Superior Court of Law of NEW HANOVER County, at the Fall Term, 1850, his Honor, Judge *Battle*, presiding.

The declaration is in assumpsit and contains two counts: one, on the acceptance of a bill of exchange, drawn by the plaintiff on the defendant in favor of Randolph McMillan, or order, and endorsed by him to the plaintiff; and the other, on an account stated. Plea, non assumpsit; and on the trial the plaintiff proved the acceptance and rested his case; and the counsel for the defendant then

insisted, that the plaintiff could not recover. But a verdict was rendered for the amount of the bill and interest, upon an agreement, that judgment should be entered on it, if the court should think the plaintiff entitled to recover on either count; and, if not, that the verdict should be set aside and a nonsuit entered. His Honor was afterwards of opinion, that the plaintiff could not recover on the bill, but that he could on the other count. Judgment was entered accordingly, and the defendant appealed.

No counsel for the plaintiff.

D. Reid, with whom was *Strange*, for the defendant, referred to the following authorities:

1 Stephen, 948; Bayley on Bills, 392; 1 Saund., 287; 4 Phil. E. American Notes, 15; 2 Starkie on Ev., 182.

And commented on the cases, *Thompson* v. *Morgan*, 3 Camp., 101; *Rhodes* v. *Grist*, 5 B. & A., 244.

RUFFIN, C. J. As the bill was payable to the order of McMillan, the plaintiff could make a title to it, only through his order. Indeed, the plaintiff declared as the endorsee of McMillan. The omission to prove the endorsement was, therefore, fatal to the count on the instrument.

The proof seems to be equally defective on the second count. The drawer of a bill in favor of another person has an action on him against the acceptor, upon its being returned for non-payment; and, in such a case, the bill may be evidence upon the common counts. But, when the drawer brings such an action on the bill, the declaration states not only the drawing of the bill, and its acceptance, and the non-payment by the defendant, but also that the plaintiff thereby became liable, as drawer, and paid it. *Symmond* v. *Parminter*, 1 Wil., 185; Bayley on Bills, 392, and the cases collected in 1 Saund. Plead. Ev., 278. It is therefore indispensable on such a count to prove the pay-

ment of the bill, or, at the least, to prove the payee's name in blank on the bill, as an authority to fill up a receipt to the plaintiff for its amount; for the mere possession of the bill, payable, and therefore belonging, to a third person, is not evidence that the drawer has got it up by paying it, so as to entitle him to sue on it. If a bill be payable to the drawer's own order and he transfers it by endorsement, and, afterwards, becomes the holder again, he may then have an action on it, against the acceptor, because by the possession he stands, *prima facie*, on his original rights—like the payee of a promissory note, who loses it, and gets it back again, for, by striking out the endorsements, the holder in each case has the apparent legal title. But it is otherwise between the drawer, and acceptor of a bill payable to another, for the drawer has no original right to the instrument nor against the acceptor, but only the right arising out of his secondary liability in the event of non-payment by the acceptor on due presentment. Hence, the necessity, as before mentioned, that the drawer should show such failure by the acceptor, and that he, the drawer, paid the money, in order to entitle him to sue on the bill. Then, if the plaintiff had declared on the bill, upon his own right as the drawer, instead of endorsee of the payee, he could not have recovered for want of requisite proof. The same reasons apply equally to the count on the *insimul compulassent*, and, indeed, to all the money counts; for the possession of the instrument—belonging upon its face to another person—is no evidence that the drawer, more than any other stranger happening to get hold of the bill, was liable on it and had been duly compelled to pay it, so as thereby to found a presumption, that he had lent the acceptor money, or paid it for his use, or that they had accounted together and the acceptor been found to be the drawer's debtor to the amount of the bill. There is in that case no direct liability of the acceptor to the

drawer; and, consequently, no such privity as can authorize the implication of the promises supposed in the common count.

The judgment must be reversed, and judgment of nonsuit be entered, according to the agreement in the record.

PER CURIAM. Judgment accordingly.

THOMAS C. WILDER v. RICHARD B. CREECY, et al.

Where a person hired a negro to another, and one of the stipulations at the hiring was, "that the negro should not go by water," and the person, who hired the slave, permitted others to use him and by them he was employed on the water, in consequence of which he lost his life, *Held*, that these latter persons were not answerable in damages, for the loss of the slave to the original hirer; for the stipulation was merely personal, and in no way attached to the slave.

Appeal from the Superior Court of Law of CHOWAN County, at the Fall Term, 1850, his Honor, Judge *Caldwell*, presiding.

The action is trover for a negro slave, Alfred, with a special count in case on the following facts, which appeared at the trial on not guilty pleaded. One Fenill hired the slave from the plaintiff for the year 1846, and one of the terms of the hiring was, that the negro "should not go by water." Fenill placed this and other slaves for the year under the change of one Carter, his brother-in-law, at a place situated on Albemarle Sound, and, in the month of December of that year, the defendants, Creecy and Pool, hired Alfred and some other slaves from Carter to assist in getting out and delivering some corn (which they had at Carter's, and had sold) on board a vessel lying at anchor,

about three or four hundred yards from the shore. Those defendants put the hands under the other defendant, Gregory, and he, by the consent of Carter, sent Alfred on board the vessel to assist in stowing away the corn in the hold, and he worked there one day and went on shore at night. The next day he returned to the same employment, and worked at it until evening; when the captain of the vessel, then being on shore, stated to Carter that he thought there was about to be a storm, and said that he would go aboard, and send Alfred ashore, but Carter told him he need not send the boy ashore, as he might be of service in case a storm should come on. The captain went aboard and did not send Alfred ashore, and a storm came on that night, and during its continuance the slave died from fright or cold, or their combined effects. On the part of the plaintiff objection was made to the admission of the conversation between the captain and Carter, but the court received it. The plaintiff gave evidence that the hiring by Fenill was as the highest bidder at a public hiring, and that the defendant, Pool, was at the place of hiring, when the terms were made known, and hired another negro at that hiring.

The counsel for the plaintiff moved the court to instruct the jury, that, if they believed the defendants knew of the terms, upon which Fenill hired the boy Alfred, it was a wrongful act in them to send him aboard the vessel, for which the plaintiff was entitled to recover. But the court refused to give the instructions prayed for, and directed the jury that, upon the facts, as stated, the plaintiff was not entitled to recover. The plaintiff then submitted to a nonsuit and appealed.

Heath, for the plaintiff.

A. Moore, for the defendant.

RUFFIN, C. J. The opinion of the Court concurs with that given by his Honor. By the hiring the property vested for the term in the hirer, and the plaintiff had the reversion only. The stipulation, that the slave was not to go by water, was not a limitation to the estate of the hirer, whereby it would be determined and the property be revested in the plaintiff, nor even a condition, which would have authorized him to determine the hiring and resume the possession, but merely an engagement of the hirer not to expose the slave to the hazards of employments on the water. As the plaintiff had but the reversion at the time of the slave's death, that by itself defeats the count for trover. For much the same reasons the other count must also fail. As a stipulation it was personal merely, and did not attach to the slave, in the nature of a covenant running with land. The knowledge or ignorance of its existence could not make it more or less binding upon one not a party to it, as the assignee of the property can in no degree be affected by it. It would expose third persons to great damage, and, indeed, prevent much of the traffic of life, if they were charged with the consequences of collateral engagements of this kind, between persons, who let or take on hire; and therefore their obligation is wisely restricted to the parties themselves. The evidence objected to was competent to show, that the negro was on board the vessel by the direction, or account of Carter, the person in possession.

PER CURIAM. Judgment affirmed.

DEN ON DEMISE OF JAMES W. MURRELL v. JAMES E. ROBERTS.

A reversion in fee, after a term for years, is the subject of execution; the sheriff's deed is as effectual to pass it as that of the reversioner; and the tenant, who claims under such deed, is not estopped from setting it up as a bar to an action of ejectment by the reversioner.

Payment to the sheriff discharges an execution; and a subsequent sale of property under such execution is void, and conveys no title to the purchaser

Appeal from the Superior Court of Law of BRUNSWICK County, at the Fall Term, 1850, his Honor, Judge *Battle*, presiding.

The lessor of the plaintiff was seized of the premises in fee on the first day of January, 1843, and then leased them to one John Smith for the term of six years. The plaintiff gave evidence, that Smith entered and executed a deed in fee in 1846 to one Dudley, under whom the defendant was in possession at the commencement of this suit in April, 1849.

On the part of the defendant evidence was then offered, that one Sullivan obtained a judgment in debt against the lessor of the plaintiff and another person, on which a *fieri facias* was issued, by virtue of which the premises were sold in 1846 by the sheriff, and conveyed in fee to the said Smith, and that he afterwards conveyed to Dudley. This evidence was objected to on the part of the plaintiff, upon the ground, that Smith was estopped to deny the lessor's title or withhold the possession from him at the expiration of the term, and that the defendant, who claimed

under Smith, was likewise so estopped. But the court received the evidence, and thereon instructed the jury, that Smith had a right to purchase the premises at the sale by the sheriff, and that the title thereby derived might be set up against the plaintiff as a bar in this action.

On the part of the plaintiff further evidence was then offered, that, while the sheriff had the *fieri facias* in his hands and before the sale of the premises, the whole sum due thereon was paid to the sheriff by one of the defendants therein, in satisfaction thereof. But upon objection on the part of the defendant, the court refused to receive the evidence, upon the ground, that it was not competent thus to impeach the title of the purchaser at the sheriff's sale.

After a verdict and judgment against the plaintiff, he appealed.

Strange, for the plaintiff.

No counsel for the defendant.

RUFFIN, C. J. There is no error on the first point. The defendant did not attempt to set up a title, in derogation of that of the lessor of the plaintiff, at the time of his lease to Smith. On the contrary, he acted in affirmance of that title, by showing the subsequent acquisition of it by Smith so that both the term and the reversion became united in him. If the lessor of the plaintiff had, by his deed, assigned the reversion to Smith, the title thus derived might be set up as a bar to this action. It must be the same under the sale by the sheriff; for a reversion in fee, after a term for years, is the subject of execution, and the sheriff's deed is as effectual to pass it as that of the reversioner. On the other point, however, the Court holds, that there is error. Payment to the sheriff, discharges the execution. If the sheriff have a *ca. sa.* and after payment by

the debtor, within his knowledge, he, the sheriff, arrest him, it is, undoubtedly, false imprisonment. It must also be illegal to act on a *fi. fa.* after satisfaction to the sheriff, and he is a trespasser, if he seize goods afterwards. *Lefans* v. *Mooniscun*, 1 Hob., 685. As was said in the case cited at the bar, the execution became thereby *functus officio*. *Hammett* v. *Wyman*, 9 Mass. Rep., 138. It follows that a subseqeuent sale under it is void, and it was so held in that action, which was trespass by the purchaser at that sale, for a second taking of the goods, upon another execution against the same defendant. If it were not so, the sheriff might, upon another execution for a trifling sum, ruin any person, since he might raise the money over and over again by sale after sale. For, there is no difference between satisfaction by a payment by the debtor in money and one by the sale of his property. After satisfaction to the sheriff in either way, he cannot lawfully seize and sell property, more than he could, without having had an execution at all.

PER CURIAM. Judgment reversed and *venire de novo*.

NATHANIEL TAYLOR v. JONAS and WILLIAM SPIVEY.

Where to an action on a justice's judgment the defendant pleads "the statute of limitations," the plaintiff cannot reply a new promise within the seven years. The replication of a new promise is confined to actions "on promises."

Appeal from the Superior Court of Law of GATES County, at the Fall Term, 1850, his Honor, Judge *Caldwell*, presiding.

Jordan, for the plaintiff.
A. Moore, for the defendants.

PEARSON, J. This was a warrant on a former judgment of a single justice. The defendants relied on the statute of limitations. The plaintiffs in the replication alleged a new promise within the seven years. His Honor correctly decided, that the statute could not thus be met. The replication of a new promise is confined to actions "on promises." This is settled in this state and England.

The other instructions were uncalled for; at all events the plaintiff has no right to complain of them.

PER CURIAM. Judgment affirmed.

JOHN NIXON v. WILLIAM P. LONG.

Where one has a cause of action against another, accruing *after a demand* made, the suing out of a writ for that cause of action, though the writ was in assumpsit, when it should have been in covenant, is a demand in the strongest form.

The case of *Lynn* v. *McLelland*, 4 Dev. & Bat.. 459, cited and approved.

Appeal from the Superior Court of Law of PERQUIMANS County, at the Fall Term, 1850, his Honor, Judge *Caldwell*, presiding.

This is an action of covenant, upon a guaranty under seal, dated September 12, 1845, of a note executed by one Halsey for two hundred and fifty dollars, payable to the defendant. The note was executed in July, 1845, and fell due on the 1st of January, 1846. On the 13th of April, 1844, Halsey executed a deed in trust to Badham, conveying the greater part of his property to secure debts due to sundry persons, amounting to five thousand dollars or thereabouts; and, on the 11th of April, 1846, the said Halsey executed another deed in trust to one Norcom and one Benbury, embracing all the balance of his property of every description and the interest thereon, including fourteen negroes, not conveyed in the deed of 1844, to secure debts due to sundry persons, amounting to a much larger sum, than those secured in the deed of 1844. It was proved on the trial, that Halsey was reputed to be entirely insolvent, from and after the execution of the deed of 1846, and that, on the sale of all his property in December, 1848, by the said trustees, it fell short of paying the debts secured in the sum of six thousand dollars. It

also appeared, that in March, 1849, the plaintiff made a demand on Halsey to pay the said note; that, in May, 1849, the plaintiff, by his counsel, sued out a writ in assumpsit on the said covenant, returnable to May term of Perquimans county court (the second Monday of May) and returned "executed;" that his counsel moved the court to change the said writ from case to covenant, which motion was refused, and the plaintiff submitted to a non-suit. Whereupon the present suit was brought, returnable to August term, 1849, of Perquimans county court.

The defendant offered to prove by parol, that it was a condition of the said guaranty, that suit should be brought by the plaintiff on the note in question. The evidence was rejected by the court.

The court charged, that the plaintiff was bound to use the same degree of diligence in collecting the note from Halsey, that a prudent man would use in collecting a debt of his own; that, if he had failed to do so, then the defendant was entitled to their verdict. The court further charged, that the suing out of the writ in May, 1849, though not in proper form, was such a demand on the defendant, as would satisfy the law. To this latter part of the charge the defendant excepted. After the jury had been out some time, they returned into court, and asked, if the said note was not secured in the deed of trust of April, 1846; to which the court answered, that the deed embraced a debt of two hundred and fifty dollars, the balance due on two notes, and there was no other evidence, that it embraced the note of two hundred and fifty dollars, now the subject of litigation. To this answer of the court to the interrogatory of the jury the defendant excepts. The defendant also excepts to the opinion of the court, in rejecting the parol evidence.

The jury returned a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

A. Moore, for the plaintiff.

Heath and *Jordan*, for the defendant.

PEARSON, J. The defendant offered to prove by parol, that it was a condition of the covenant, that Nixon was to bring suit on the note. The court rejected the evidence, and to this the defendant excepts. There is no error. We can see no reason for making an exception, in this case, to the rule, that a written instrument cannot be added to, varied, or explained by parol proof.

The court charged, that, suing out the writ in May, 1849, although it was not in proper form (being in assumpsit,) was a sufficient demand. To this the defendant excepts. There is no error. The writ, issued in May, 1849, was for the *same cause of action*, and amounted to full notice and was in fact a demand in the strongest form. *Linn* v. *McLelland*, 4 Dev. & Bat., 459.

We can see no force in the exception to the answer made by the court to the interrogatory of the jury; it was simply a recital of the evidence on that point. These are the only points presented by the case.

PER CURIAM. Judgment affirmed.

DEN ON DEMISE OF MARTHA DUCKET et al. v. CHARLES W SKINNER, JUN.

The county court, on the petition of the guardian of a certain infant, passed the following order—"Ordered that he, the said W. B., guardian, sell the land of said deceased T. H., or so much thereof as will be sufficient to discharge the debt;" *Held*, that this order was unauthorized and void, and, of course, that a purchaser under it acquired no title.

The case of *Leary* v. *Fletcher*, 1 Ire., 269, cited and approved.

Appeal from the Superior Court of Law of PERQUIMANS County, at the Fall Term, 1850, his Honor Judge *Caldwell*, presiding.

In this action of ejectment, the following facts appeared:

Thomas H. Harvey died in 1808, seized of the premises in fee, and left an only child, Mary Eliza, who married under the age of 21 years, and died under coverture, leaving two children, who are the lessors of the plaintiff and were infants when this suit was brought. In May, 1809, William Blount was duly appointed the guardian of Mary Eliza Harvey, by the county court of Perquimans, and at the same time the court passed an order in the words following: "Ordered that he, the said William Blount, guardian, sell the land of said deceased Thomas Harvey, or so much thereof as will be sufficient to discharge the debts." In pursuance of that order, the premises described in the declaration were sold by the said Blount, at public sale, to a person, under whom the defendant came in, and was in possession at the commencement of this action.

On the foregoing statement, as a case agreed, the cause was submitted in the superior court, upon an agreement, that, if the court should be of opinion, the plaintiff was entitled thereon to recover, judgment should be entered for him for the term and six-pence damages and costs; and, if otherwise, that there should be judgment for the defendant. Judgment was given for the plaintiff, and the defendant appealed.

No counsel for the plaintiff.

A. Moore, for the defendant.

RUFFIN, C. J. The case is very defectively stated: omitting, for example, to set forth, that the purchaser did or did not take a conveyance. But it is not material to advert to those considerations, since, supposing the best for the defendant on everything not stated, it appears affirmatively, that his title is essentially defective, by reason that the order for the sale was unauthorized and void. The case of *Leary* v. *Fletcher*, 1 Ire., 259, is a direct authority to that point, and renders further discussion of the principle unnecssary.

PER CURIAM. Judgment affirmed.

FRANKLIN F. FAGAN v. THOMAS S. ARMISTEAD.

Where several cases have been decided upon the same question, after argument, the Court will not reconsider the grounds of those decisions, especially upon a case presented without argument.

That "all waters, which are actually navigable for sea vessels, are to be considered navigable waters, without regard to the ebb and flow of the tide, and that no one is entitled to the exclusive right of fishing in any navigable water, unless such right be derived from an express grant by the sovereign power, or, perhaps, by such a length and kind of possession, as will cause a presumption of such grant to arise," must now be deemed the settled law of this state.

A common informer cannot recover a penalty, unless he sue within the period allowed by the act imposing the penalty. As where a penalty is imposed on persons fishing in the Roanoke river at certain times, and any person may sue for the same, provided he does so within one month from the forfeiture, and if no such suit is brought within that period, the law-officer of the State is directed to sue for the use of the state, (act of 1827, ch. 54,) it was held that, after the expiration of the month, the right of the common informer was gone.

The cases of *Wilson* v. *Forbes*, 2 Dev., 30, and *Collins* v. *Benbury*, 3 Ire., 277, and 5 Ire., 118, cited and approved.

Appeal from the Superior Court of Law of WASHINGTON County, at the Fall Term, 1849, his Honor, Judge *Bailey*, presiding.

This is debt for $250, claimed as a penalty for fishing in Roanoke river with a seine, contrary to the act of 1827, c., 54, entitled "an act to prevent the obstruction of fish passing up the Roanoke and Cashie rivers and their waters." Pleas, *nil debet*, and statute of limitations. By the act, every person, owning and using a seine for the purpose of catching fish in either of the rivers, is required to take it out of the water and let it remain out from twelve o'clock on Saturday until 12 o'clock on Monday of each week,

from the 1st day of March to the 25th of May in every year, and it is enacted that any person who shall violate that provision, shall forfeit for each offence the sum of $250, to be recovered by any person who shall first sue for the same; one-half for the use of the informer and the other half for the use of the poor of the county; with a proviso, that if no person shall sue for the penalty within one month from its forfeiture, then that the solicitor for the state shall sue for the same in the name of the Governor, for the use of the state.

The writ was sued out on the 24th of May, 1849, and on the trial the parties made up the following case agreed. The defendant was seized in fee simple in possession of a tract of land lying on Roanoke river, and consisting entirely of marsh or swamp land, destitute of timber and valuable only for its fishing privilege and used for no other purpose, to which he derived title under a patent which issued before the year 1827: Roanoke river in front of said land is a fresh water stream, about 300 yards wide, from ten to twelve feet deep, and affords, with the sounds, unobstructed navigation for sea vessels to the ocean; but it has not there, nor for many miles down the river, any ebb, or flood of the tide. On the 16th day of April, 1849, between the hour of 12 o'clock on Saturday, and 12 o'clock on Monday next following, the defendant, being the owner of a seine, put it into the water of Roanoke river in front of his said land, and hauled it ashore on his land aforesaid, enclosing, landing, and catching therewith a quantity of shad and herrings. On this case the opinion of the presiding judge was in favour of the plaintiff, and judgment was entered for him, and the defendant appealed.

No counsel for the plaintiff.

Heath, for the defendant.

RUFFIN, C. J. The case has not been argued, but it seems probable, that it was framed with a view to obtaining the opinion of the Court upon the questions, whether the land of the defendant is bounded by the Roanoke at the water's edge or by a line along the thread of the stream, and, if the former, whether the legislature can restrict him in the use of it, as enacted in the statute. The latter point is immaterial to the defendant, if the former be against him, and that it is against him the cases of *Wilson* v. *Forbes*, 2 Dev., 30, and *Collins* v. *Benbury*, 3 Ire., 277, and 5 Ire., 118, are direct authorities. Although we might have been willing to hear another argument on the point, and to have reconsidered it, if the argument should raise a doubt on it, yet it is too much to expect the Court, without argument, to go over the whole subject of themselves, and reverse a series of adjudications made upon solemn arguments. We think it our duty to adhere to those decisions under the circumstances, simply upon their authority, and therefore the judgment would be affirmed, if it were not for another objection, which appears on the record, and is deemed fatal to the action. It is, that the suit was not brought in due time, and therefore cannot be maintained. A common informer cannot recover a penalty, unless he sue within the period allowed him by the act, as it forms a part of his title. The general rule is, that a penalty imposed by statute belongs to the sovereign, unless the right to sue be given to some one else. Here, the enacting clause gives it to the person first suing for it, subject only to the limitation in point of time by the general act of 1808. But the proviso makes it the first duty to the public law-officers to sue for the use of the state, if no private person shall have sued within one month from the forfeiture. As the right is thus reserved to the state after that period, it is an unavoidable implication, that individuals are excluded from it after the same period. This suit was

not brought until the 24th of May, although the forfeiture was on the 16th of April; and for that reason the judgment must be reversed, and judgment entered for the defendant, according to the case agreed.

PER CURIAM. Judgment reversed and judgment for the defendant.

THE STATE to the use of FERRAND'S Ex'rs v. SHEPARD W. BURCHAM, et al.

When a constable is appointed by the county court at May term, his appointment expires at the next February term, which is the regular time prescribed by law for the qualification or appointment of constables.

The case of the *State* v. *Wilroy*, 10 Ire., 330, cited and approved.

Appeal from the Superior Court of Law of CARTERET County, at the Spring Term, 1849, his Honor, Judge *Battle*, presiding.

J. H. Bryan and *J. W. Bryan*, for the plaintiff.
No counsel for the defendants.

PEARSON, J. This was an action of debt upon a constable's bond.

The defendant, Burcham, was appointed constable at May term, 1843, (no appointment of constable for his district having been made at February term). The claim, for which this action is brought, was put into his hands

in March, 1844. It was insisted, that Burcham's term of office expired at February court, 1844, and it was so decided, and the plaintiff appealed. We concur in the opinion. February term is the time fixed on, by law, for the appointment of constables, and if one is appointed at a subsequent term, his term of office expires at the next February term.

This is the construction given to the statute in *State* v. *Wilroy*, 10 Ire., 330. There is no error in the judgment below.

PER CURIAM. Judgment affirmed.

WILLIAM C. LOFTIN v. GEORGE W. KORNEGAY, et al.

Where three are sued in debt, and one of the defendants, not contesting the plaintiff's right to recover, pleads that he is a cosurety of one of the other defendants, and a verdict is found against him, it is very doubtful whether he can appeal at all; but certainly he cannot appeal alone.

Appeal from the Superior Court of Law of LENOIR County, at the Fall Term, 1850, his Honor, Judge *Ellis*, presiding.

W. H. Wright and *J. H. Bryan*, for the plaintiff.
No counsel for the defendant.

PEARSON, J. This was debt on a note, executed by Kornegay, Davis and Jarman. The defendants did not resist the plaintiff's recovery; but Jarman "pleaded" that he was the surety of Kornegay and Davis. Davis "pleaded" that he and Jarman were sureties of Kornegay.

The jury returned a verdict for the plaintiff, and found that Jarman was a cosurety with Davis. From the judgment rendered on this finding, Jarman was allowed to appeal, the other defendants not objecting.

This proceeding is under the sec. 131, 132, ch. 31, of the Revised Statutes. The "pleas," as they are called, do not contest the plaintiff's right to recover, but merely raise a family dispute between the defendants, in which the plaintiff has no concern. It is very questionable whether the right of appeal is given in such cases, as an appeal must necessarily delay the plaintiff's admitted right of recovery. But in this case, the appeal is only taken by the defendant Jarman, and it is settled that one of two defendants cannot appeal. In such cases it is hardly to be expected that the other defendant will join in the appeal, as he has no reason to complain of the result.

PER CURIAM. Appeal dismissed.

WILLIAM W. GRIFFIN v. DANIEL RICHARDSON.

A., by a *bona fide* deed proved and registered in May, 1843, conveyed a slave to B. in trust to secure the payment of certain debts. B. by deed conveyed the slave to C. for a certain price, all of which was afterwards paid by A. except $100. C. then by deed dated in 1847, and proved in 1849, in consideration of the said $100 conveyed the slave to D.; *Held*, that, though D. might have taken that conveyance in trust for A. upon the payment of the $100, yet while the property remained in that situation, the $100 not being paid, A. had no such interest as was liable to an execution against him.

Estoppels must be mutual, and bind only parties and privies. One, who is not bound by an estoppel, cannot take advantage of it.

The case of *Gowing* v. *Rich*, 1 Ire., 553, cited and approved.

Appeal from the Superior Court of Law of PASQUOTANK County, at a Special Term in December, 1850, his Honor, Judge *Battle*, presiding.

This was an action of detinue for a negro slave named Mary. Plea, *non detinet*. Upon the trial, both parties claimed under Stephen D. Pool, to whom the slave in question formerly belonged. The plaintiff exhibited a deed in trust from the said Pool to William L. Shannonhouse, dated, proved and recorded in 1843, the trust being in payment of certain debts therein named. Shannonhouse, the trustee, sold the slave at public auction, to Samuel J. Proctor for $625, and conveyed her by bill of sale for that consideration. Proctor, afterwards, conveyed the slave to the plaintiff, by deed dated in November, 1847, and recorded in March, 1849. It this deed the consideration is stated to be five hundred dollars, and it is recited that the property had been conveyed by the said Proctor to J. C. B.

Ehringhaus in trust, by a deed bearing date in December, 1843, and duly registered. The plaintiff further proved a demand and refusal.

The defendant then produced the record of a judgment against the said Pool, rendered by the county court of Pasquotank, at December term, 1848, on a note bearing date in August, 1848. He then shewed an execution, issued on the said judgment, proved a sale made under it by the sheriff on the 17th of February, 1849, and produced the sheriff's deed to himself. He then called as a witness Samuel J. Proctor, who testified, that the slave, Mary, remained in the possession of Pool, from the time of his execution of the deed in trust to Shannonhouse, until she was sold by Shannonhouse; that he, the witness, purchased her for the benefit of the said Pool, intending, however, to retain the title until her purchase money should be repaid; that payments were made by some person, (it was alleged to be by Pool,) until the sum was reduced to one hundred dollars, with a small amount of interest accrued thereon. He testified further, that, when he was about to sell the slave to the plaintiff, he and Pool were at the plaintiff's office, and Pool said to him in the plaintiff's presence, that he, the plaintiff, had befriended him before, and that he was willing to do it again, and that the plaintiff would pay him one hundred dollars for the said slave, and keep the title as collateral security, until Pool should be able to repay him; and that he, the witness, received the one hundred dollars from the plaintiff and executed the bill of sale above referred to. This witness testified further, that the debts, mentioned in the deed in trust from Pool to Shannonhouse, were fair and *bona fide*. It was also in evidence, that Pool was reputed to have been insolvent, for some years prior to 1848, but no witness testified to the existence of any debt, owing by him in 1843, which was not embraced in the said deed in trust. It was proved, also, that the slave remained in

Pool's possession, until she was levied upon by the sheriff. The defendant contended, that the plaintiff was estopped, by the recital in the bill of sale from Proctor, to shew that the title was not in Ehringhaus. But the court was of opinion, that the plaintiff could not be estopped by a deed, which the defendant objected to as void. The defendant then insisted, that the plaintiff's bill of sale was not registered, until after the time the lien of his execution had attached, and that it was fraudulent and void, because it was absolute on its face, whereas, he contended, that it was made in trust for Pool. He contended further, that it was void, as was also the deed in trust from Pool to Shannonhouse, because Pool had been permitted to retain possession.

The court was of a different opinion upon all these points, and charged the jury, that the plaintiff was entitled to recover. There was a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

B. F. Moore and *Ehringhaus*, for the plaintiff.
Heath, for the defendant.

PEARSON, J. In May, 1843, Pool conveyed the slave to Shannonhouse, in trust to pay certain debts. Soon thereafter, Shannon sold the slave, at public auction, to Proctor, who paid for her by putting his note in bank for the price, $625, in satisfaction of a debt secured by the trust. Pool continued in possession and made sundry payments upon Proctor's note in bank, so as to reduce it to about $100. In November, 1847, Proctor, upon the payment of the $100 by Griffin, conveyed the slave to him. In December, 1848, a judgment was taken against Pool, and the slave was levied upon as his property, and sold by the sheriff to the defendant, in February, 1849.

The court was of opinion that the plaintiff was entitled to recover. We concur in the opinion. The deed

of trust, which is *admitted to have been bona fide*, passed the title out of Pool, and the sale by Shannonhouse passed it to Proctor, who passed it to Griffin, the plaintiff.

Admit that Proctor took the legal title in trust for Pool, after the payment to himself of $625. Admit that, under this arrangement, Pool reduced the debt to $100, and then Proctor, upon the payment of that sum by the plaintiff, conveyed to him, and that he took the title to secure the $100, and then in trust for Pool. The latter had no such interest as was liable to execution. *Gowing* v. *Rich*, 1 Ire., 553. Nor does the fact, that Pool continued in possession during all the time, make it a fraud under the statute of Elizabeth. That statute never applies, except when the original transfer by the debtor is fraudulent, so that, by treating it as void against creditors, the title will still be in him. Suppose, on account of the benefit intended for Pool, the deeds to Griffin and Proctor are both treated as void. The title is in Shannonhouse, who is admitted to have acquired it without fraud, and Pool has only such an interest as can be reached in equity.

The question of estoppel does not arise. The defendant was not a party, or privy to either of the parties, in the deed by Proctor to the plaintiff, in which there is a recital of a deed by Proctor to one Ehringhaus or in the deed referred to in the recital. Estoppels must be mutual, and bind only parties and privies. One who is not bound by an estoppel cannot take advantage of it.

PER CURIAM. Judgment affirmed.

JACOB LASSITER v. HYRAM WARD.

In an action on the case, a count in deceit, for knowingly misrepresenting the soundness of a chattel, may be joined with a count for the breach of a warranty of the soundness of the same chattel.

Appeal from the Superior Court of Law of MONTGOMERY County, at the Fall Term, 1850, his Honor, Judge *Battle*, presiding.

This is an action on the case in *tort*, and the declaration contains two counts. The first is in the usual form for a deceit in selling the plaintiff an unsound horse, by falsely representing him to be sound, he, the defendant, then and there knowing him to be unsound; and the second, for a false warranty of soundness of the horse. Plea, not guilty. On the trial, the evidence was, that the defendant warranted the horse to be sound, and that he was in fact not sound. The counsel for the defendant then insisted, that the plaintiff could not recover for want of proof that the unsoundness was known to the defendant. But the court held, that the plaintiff might recover on the second count without proving a *scienter*. The jury gave a verdict for the plaintiff, and the defendant moved for a *venire de novo*, on the ground of error in the opinion of the court, which was refused. A motion was then made in arrest of judgment, upon the ground, that the two counts could not be joined. That was also refused, and judgment given on the verdict, and the defendant appealed.

Winston, *Sen.*, and *Miller*, for the plaintiff.
Dargan and *Mendenhall*, for the defendant.

RUFFIN, C. J. Though one would expect assumpsit to be brought on a warranty of goods, as well as any other

parol contract, yet it is, comparatively, a recent thing that it was brought in such cases. Its propriety seems to have been questioned as late as the cases of *Stewart* v. *Wilkins*, Doug., 18; and it cannot be said to have been judicially settled earlier, though the action had been sometimes brought. It was questioned on the ground, that the action on the case in *tort* was the established remedy, and, therefore, the proper one. It was, however, held that either of the actions would lie upon an express warranty. Afterwards it was attempted to give another turn to the matter in the opposite direction, namely, by contending that assumpsit was the peculiar remedy on a false warranty, and that the declaration could not be in *tort*, unless it alleged a *scienter;* which was as much as to say, that the action on the case would not lie on the warranty, but only on the cheat. *Williamson* v. *Allison*, 2 East., 446. But there were so many precedents of actions in *tort* for a false warranty, as to shew clearly, that it had been formerly the common remedy, if not the only one, in use, and to induce the Judges to sustain it. It was, accordingly, there held that the declaration might be in *tort* without alleging a *scienter*, and, if it be alleged in addition to the warranty, that it need not be proved. The doctrine of the case is, that, when there is a warranty, that is the gist of the action, and that it is only when there is no warranty that a *scienter* need be alleged or proved. It is nearly half a century since the decision, and during that period, the point has been considered at rest, and many actions have been brought in *tort*, as well as *ex contractu*, on false warranties. 1 Chit. Pl., 956, 429; 2 Chit. Pl., 279. There is no doubt as to the propriety of joining the two counts; for, it is an action on the case, and the counts, being both in *tort*, are compatible. If it were otherwise, it would not be material in this case,

as the evidence applied to the second count, and the instructions to the jury referred to it alone, and therefore the verdict might be amended by entering it on that count only. *West* v. *Ratlidge*, 4 Dev., 31.

PER CURIAM. Judgment affirmed.

WILLIAM RICHMOND v. JOHN FUGUA.

After a debt had been barred by the statute of limitations, the debtor said to the creditor, "unless J. R. has paid it for me, it is a just debt and I will pay it;" and again, "it is a just debt and I will pay it, if I cannot prove, that it has been settled by J. R."; *Held*, that the case was thereby taken out of the statute. By such declarations, the *onus* of proof that the debt had been paid rested on the defendant.

Appeal from the Superior Court of Law of CASWELL County, at the Fall Term, 1850, his Honor, Judge *Manly*, presiding.

The suit is assumpsit for money paid for the defendant, as his surety. It was commenced the 20th of November, 1848. Plea, statute of limitations. On the trial the evidence was, that the plaintiff was the surety for the defendant to one Long, and that the plaintiff paid the debt in 1840, at which time the defendant resided in another state. In the year 1848, the defendant returned to this state, and, a short time before this suit was brought, the plaintiff requested payment from the defendant, and, in the conversation between them about this debt, the defendant said, unless John Richmond has paid it for me, it is a just debt

and I will pay it, and in another conversation on the same subject the defendant said to the plaintiff, "It is a just debt, and I will pay it, if I cannot prove, that it has been settled by John Richmond." John Richmond, who was referred to by the defendant, was present in court at the trial, but was not called upon by either party. The point made was, whether there was such a promise or acknowledgment, on the part of the defendant, as revived the debt and entitled the plaintiff to recover. The court held that there was, and after a verdict and judgment for the plaintiff the defendant appealed.

Kerr, for the plaintiff.
S. P. Hill, for the defendant.

RUFFIN, C. J. The Court thinks the judgment should be affirmed. There is not only an acknowledgment of the original justice of the debt, and of its being just still, with the proviso only, that it had not been paid by a particular person named, but also an express promise then, to pay the debt, unless or if the defendant could not prove the payment had been made by that person. The defendant undertook in substance, to prove payment by an individual named, or, upon failure thereof, to pay the money. Upon the strength of that undertaking the *onus* was on the defendant, since he designated, with precision, the fact on which he relied for his discharge, and the person by whom he engaged to establish the fact affirmatively.

PER CURIAM. Judgment affirmed.

JAMES TAYLOR v. JOHN W. STEDMAN.

Where a plaintiff in an action of assumpsit, in order to bar the operation of the statute of limitations, gives in evidence words used by the defendant, the language must be such as, without straining, imports a willingness and intention thereby to assume the debt, or amounts to an equivocal acknowledgment of its subsistence and obligation.

In a conversation between the plaintiff and the defendant, in relation to the matter in dispute, the former said to the latter, "that matter about Frank's hire in 1842 must be fixed," when the latter asked, "will not other notes or judgments do instead of my note?" and the plaintiff remarking, "yes, if they are good," nothing further passed between them; *Held*, that the defendant's expressions did not revive the debt, and bar the operation of the statute.

The case of *Wolf* v. *Fleming*, 1 Ire., 290, cited and approved.

Appeal from the Superior Court of Law of CHATHAM County, at the Fall Term, 1850, his Honor, Judge *Manly*, presiding.

This action is assumpsit for the hire of a slave, named Frank, for the year 1842. The suit was brought on the 25th of August, 1848, and the defendant pleaded non-assumpsit, and the statute of limitations. After establishing the hiring and the price, the plaintiff gave evidence of a conversation between him and the defendant in 1845, in which the plaintiff demanded the payment of this and other debts from the defendant, and the latter denied that he owed the plaintiff on any account, and insisted particularly that he had paid him for Frank's hire, and thereupon, the plaintiff produced a note, given to him by the defendant on another account, on which there was a balance due, and contended that the hire of Frank had not

been paid. The plaintiff gave further evidence of another conversation between the parties in 1848, in which the plaintiff said, "that matter about Frank's hire for 1842, must be fixed," and the defendant, in return thereto, asked the plaintiff, "Will no other notes or judgments do, instead of my note," and the plaintiff replied, "yes, if they are good;" and nothing further passed between them. The court instructed the jury, that "the conversation between the parties in 1847 or 1848, wherein the defendant proposed to pay the debt in other notes or judgments, was an acknowledgment of a subsisting debt, which repelled the operation of the statute of limitations." The jury found for the plaintiff, and the defendant appealed from the judgment.

J. H. Houghton, for the plaintiff.

W. H. Haywood, for the defendant.

RUFFIN, C. J. The Court does not concur in the directions to the jury. The defendant is entitled to have his words fairly construed, so as to ascertain his real meaning, and the statute must stand as a bar, unless his language be such as, without straining, imports a willingness and intention thereby to assume the debt, or amounts to an unequivocal acknowledgment of its subsistence and obligation. Here it was supposed by his Honor, that the defendant proposed to pay the debt, and that the requisite acknowledgment was to be implied from the proposal. But, there was in truth no such proposal. The defendant, upon being pressed by the plaintiff to adjust the dispute about this demand, only enquired, whether the plaintiff would take notes on other people instead of his, which is very different from directly proposing payment in that manner, since his willingness to settle the controversy in that way might depend much on the value of the securities to be

transferred, and his liability on them. Hence where the plaintiff said, they must be good, the defendant proceeded no farther in making either an enquiry or proposal. If, however, there had been a distinct proposal to give the plaintiff particular notes or judgments, the requisite promise or acknowledgment could not be inferred therefrom, by itself, for that would convert an offer to pay in notes or a horse into a promise to pay in cash, though so very different, since an offer to pay in notes, like one to give a smaller sum than the alleged debt, is rather a proposal of compromise than assuming the debt anew, which brings the case within that of *Wolf* v. *Fleming*, 1 Ire., 290.

PER CURIAM. Judgment reversed and *venire de novo*.

ROBERT CAFFEY and wife v. ROBERT C. RANKIN.

On a petition, under our Act of Assembly, for permission to emancipate a slave the right of property in the slave cannot be determined. If a claim of right in the property, supported by affidavit or otherwise, is set up, in opposition to the right asserted by the petitioner, the court should stay proceedings on the petition, until this matter can be determined between the parties, in an action at law or in equity.

Appeal from the Superior Court of Law of GUILFORD County, at the Spring Term, 1849, his Honor, Judge *Battle*, presiding.

This was a petition filed at the spring term, 1848, of Guilford superior court, for permission to emancipate a negro boy, named Alvis, and other slaves named. The petition in substance sets forth, that some time about the

year 1837, James Davis died, having first made and published his last will and testament, which was afterwards admitted to probate, and his widow, Sophia Davis, who was named therein sole executrix, duly qualified as such; that the said Sophia Davis died about the year 1848, having duly made and published her last will and testament, which was duly admitted to probate, but of which she appointed no executor; that the petitioner, Robert Caffey, has been duly appointed administrator with the will annexed of the said James Davis, and the other petitioner, Jane Caffey, administratrix, with the will annexed of the said Sophia Davis. The petition further sets forth, that the said James Davis by his said will, among other things, bequeathed and directed as follows: "One negro girl named Nelly, and one mulatto named Nehemiah, I give them to my wife (said Sophia) during her natural life or widowhood, then to my son, Michael C. Davis, to him and his heirs forever, except Nelly and Nehemiah are to be free, if they can comply with the requisition of the law of this state; and if they cannot comply with the law to be free, and Michael C. Davis should die, without any heirs of his body, Nehemiah and Nelly may choose their own homes, where they like to live, and is to be sold privately at the valuation of two men:" That, between the making of the will of the said James Davis and his death, the slave Nelly had one child named Wright, which was sold by the said Sophia as executrix to one M. C. Davis, who afterwards sold and conveyed the same back to the said Sophia; and that, after the death of the said James Davis, the said Nelly had another son by the name of Alvis. The petition further sets forth, that Michael C. Davis, son of the testator James Davis, is dead, leaving an only child, the defendant James C. Davis, an infant, of whom Robert C. Rankin is guardian. The petition further sets forth, that the said Sophia Davis, by her last will, among other things, bequeathed and directed

as follows: "I give and bequeath to my grandson, James C. Davis, the only son of my son Michael Caffey Davis, deceased, one negro boy named Wright, and one negro boy named Alvis, on condition if Nehemiah and Nelly, their father and mother, comply with the laws of this state and go free, it is my will they should go with them, and not be kept back on account of their age, and if not, then these negroes, Wright and Alvis, must stay with their father and mother, and not be hired out: and if not, they must have the same chance of their father and mother in choosing homes, and be sold to the same person at the valuation of the same two men, that value their father and mother, according to my husband's, James Davis, will, and if James C. Davis dies, not leaving no heirs of his own body, and these negroes cannot comply with the requisitions of the laws of this state and choose their homes and is valued, the money on conditions, if James C. Davis leaves no child of his own, if he does it is theirs, if not, it must go to the use of my step-children. It is my will they never shall be parted from their parents." The petition further sets forth, that Nehemiah is about the age of forty-five, Nelly about forty, Wright about twelve, and Alvis about nine years of age, that the petitioners are desirous to emancipate all four of the said slaves, as requested in the said wills, but that Robert C. Rankin, as guardian of the infant, James C. Davis, objects thereto, so far as regards the boy Alvis. The petition further sets forth, that the said Sophia willed and bequeathed to the said James C. Davis, other property, greater in value than the said boy Alvis, and that the petitioners are advised, that the said James C. Davis cannot hold both with and against the will of the said Sophia, and that, if he takes the legacy given him in the said will, he cannot refuse to let the said boy Alvis be emancipated; and the petitioners aver, that they are ready and willing to give the bondsand security required by law, to emancipate all of the said slaves.

The petitioners then pray, that advertisement may be made, according to law, that James C. Davis, by his guardian Robert C. Rankin, be made a party defendant, and that the court will grant them permission to emancipate the said slaves, according to law, and will make such other orders, decrees, and grant such further relief as the nature of their case may require, &c.

Whereupon advertisements were ordered and made, and a subpœna issued and executed, according to the prayer of the petition.

At the fall term, 1848, of the said court, Robert C. Rankin, as guardian of the said James C. Davis, by leave of the court, filed an answer, in behalf of his ward, in substance and to the effect following: That he admits the execution and probate of the respective wills of James and Sophia Davis, and that the petitioners are the administrators with the wills annexed of the said testators, respectively—the death of M. C. Davis, leaving an only child, the defendant James C. Davis, of whom the defendant, Robert, is the guardian—the birth of the negro children Wright and Alvis, at the times stated—and the purchase of Wright by Michael C. Davis, all as set forth in the petition. But he denies that Wright was re-sold to Sophia Davis and prays strict proof thereof. He submits that this proceeding is in a court of law, and that a court of law has no power to compel an election—that even a court of equity would not do so in a case like the present, for the reasons he assigns. He avers that he objects to the emancipation of all the slaves named, and prays to be dismissed, &c.

Replication was taken and commissions issued.

At spring term, 1850, the following decree was made by the court:

This case coming on to be heard, upon the petition, answer and agreement of the parties, which is in the following words, to-wit: "In this case it is agreed, that adver-

tisement hath been made according to law—that James Davis made his will at the time it bears date—that Sophia Davis died the 9th of January, 1848, and made her will at the time it bears date—that James Davis died in April, 1827—that the slaves, Nehemiah and Nelly, are husband and wife, and were so at the date James Davis made his will—that the slave Nelly had one child, to-wit, Wright, between the making of the will of James Davis and his death, which said slave, Wright, the said Sophia, as executrix of her husband, James Davis, sold at public auction to Michael C. Davis for $150, then an infant some 12 months old, and duly executed a bill of sale to the said Michael—that the said Michael afterwards sold to the said Sophia Davis the said slave, Wright, for $150—that he conveyed him by bill of sale, and the said Sophia held the said Wright, as her own property, until her death—and that, after the death of James Davis, the negro woman Nelly had the other child Alvis:" It is considered, ordered, adjudged and decreed by the court, that the petitioners may emancipate the slaves mentioned in the petition, to wit, Nehemiah, Nelly and Wright, and that they have leave to emancipate the said three slaves, when they shall enter into bonds, with two sureties, each good and sufficient, payable to the state of North Carolina in the sum of one thousand dollars for each of the said slaves, Nehemiah, Nelly and Wright, conditioned that the said slave or slaves shall honestly and correctly demean themselves while they shall remain within the state of North Carolina, and that they and each of them will, within ninety days after the granting of the prayer of the petition, leave the state of North Carolina, and never afterwards come within the same.

And the court, being of opinion on the whole case and on the proper construction of the two wills, made also a part of the case, that the petitioners or either of them did not have the right and power to emancipate the negro

slave child, Alvis, born after the death of the testator, James Davis, on the ground stated in the petition or any other, considered and adjudged, that the prayer of the petitioners to emancipate the said slave, Alvis, be refused.

From this judgment the petitioners prayed for and obtained an appeal to the Supreme Court.

H. W. Miller, for the plaintiffs.
Morehead, for the defendant.

PEARSON, J. We do not concur in the view taken in the court below, of the proceedings under the 59th sec. of ch. 111 of the Rev. Stat., in regard to the emancipation of slaves. In that court it was assumed, that the right of property and the authority of the executor might be contested and their rights adjudicated, and consequently that there was an appeal to this Court.

On the contrary we think the proceeding is *ex parte* under the 57th sec. The title of the petitioner is presumed to be unquestioned. Under the 59th sec. the authority of the executor is taken for granted, the court gives no *judgment*, but merely grants permission, to emancipate, upon being satisfied that due advertisement has been made, and the bonds required executed. This permission to emancipate does not bind the rights of third persons. There is no "adversary suit," and consequently no right of appeal. The proceeding does not fall under the first sec. or within either the cases enumerated in the 2nd sec. of the 4th ch., of the Rev. Stat. But it is asked, why require advertisement if there is no right of contestation? The answer is, because the interest of the real owner may be prejudiced by having his slave under this *ex parte* proceeding apparently converted into a free person, and sent out of the state, and the petitioner may not be able to answer in damages for the money.

If the petition be under the 57 sec. and the right of property is disputed, upon this suggestion, supported by proper affidavit, the court ought to suspend the proceedings, until the right can be settled in the proper action at law. If the proceeding be under the 59th sec. and the authority of the executor is disputed, upon this suggestion properly supported, the court ought to suspend the proceedings until the power of the executor can be settled by a declaration of the rights of the parties in a court of equity: In analogy to the proceeding under a petition for partition, when, if the party sets up claim in severalty, an action at law must be brought.

In this case, for instance, it is suggested, that, as the woman Nelly was given to Sophia Davis, for life, remainder to Richard Davis, the boy Alvis, after the testator's death, belongs to the personal representatives of Richard Davis, and Sophia Davis could not by her will give any authority to emancipate. The right of property, therefore, as well as the authority is disputed, and these questions cannot be settled in an *ex parte* proceeding. At all events they cannot be conclusively settled, so as to bind the representatives of Richard Davis. So it may be suggested, that as James C. Davis takes other property under the will of Sophia Davis, he ought to be put to his election. These are interesting questions, which can only be decided in equity. It manifestly was not the intention of the statute, that such questions should be settled under a petition for permission to emancipate slaves.

PER CURIAM. Appeal dismissed.

DEN ON DEMISE OF WILLIAM BADHAM, et al. v. JOHN COX.

When a vendor of land retains the title, as a security for the purchase money, and a balance remains due, the vendee has not such an interest as is liable to execution under the act, Rev., Stat. ch. 45, sec. 4, so as to divest the legal title of the vender.

Under a *venditioni exponas* against land, the sheriff can sell only that, which he could have sold under the *fi. fa.* on which the *venditioni exponas* issued, while such *fi. fa.* remained in his hands unreturned.

If the defendant in an execution has no interest in land, which is subject to be levied on, while the *fieri facias* remains in the hands of the sheriff, unreturned, but, after the return, he acquires a title, which is subject to execution, this subsequently acquired title cannot be sold under a *venditioni exponas* issuing upon such *fieri facias*.

Such subsequently acquired title shall not operate as an estopel, in favor of a purchaser at a sale, made under such *venditioni exponas*. The law only sells *estates* under its process, and not the *chances of an estoppel*..

The cases of *Flynn* v. *Williams*, 1 Ire, 509; *Gentry* v. *Wagstaff*, 3 Dev., 270; *Tarkinton* v. *Alexander*, 2 Dev. & Bat,, 87, and *Smith* v. *Spencer*, 3 Ire., 265, cited and approved.

Appeal from the Superior Court of Law of CHOWAN County, at a Special Term in December, 1850, his Honor, Judge *Battle*, presiding.

This was an action of ejectment.

Upon the trial the case appeared to be as follows: The defendant, Cox, was seized in fee of the premises, being a wharf and store in the town of Edenton, and, on the 1st of January, 1843, contracted for the sale of them to one George Gordon, in fee, for the price of $2,500, payable as follows: $1,800 on the 1st of May, 1848, and $700 on the 1st of January, 1849; and a conveyance was to be made when the purchase money with the interest thereon

should be fully paid, but, in the meanwhile, Gordon was to be let into possession. Articles were entered into accordingly, and Gordon took possession and paid the first instalment, but no part of the second. In March, 1849, judgments were obtained before justices of the peace by several of Gordon's creditors, and executions were issued thereon, and levied on the premises and returned to the county court, and in August following, orders of sale were made, and then writs *venditioni exponas* were sued out, under which the sheriff sold the premises to the lessors of the plaintiff, on the 10th of November, 1849, and made them a deed. On the 6th of May, 1849, Gordon made to Samuel T. Bond an assignment of all his interest "in the premises, in trust to sell the same and out of the proceeds pay a debt from him to Haynes and Goodridge; thereafter Gordon continued in possession until the 8th of Oct., 1849, on which day Bond, in conformity with the assignment to him, made a contract for the sale of a part of the premises to the defendant, and Gordon went out, and he and Bond let the defendant into possession of that part of the premises which he, Cox, purchased back, and which is in dispute in this action. On the 6th day of November, 1849, Cox executed to Gordon a deed in the following terms:

"Know all men by these presents that I, John Cox, of, &c., agreeable to a memorandum of agreement entered into with George Gordon of, &c., on the 1st of January, 1848, to make title to a certain portion of wharf property known as, &c., on the payment of, &c. Now therefore in consideration of the sum of $2,650 being paid before the delivering of these presents, and to enable Haynes and Goodridge to make sale and pay me, as also to convey to me, the said Cox, such portions of said property as I may purchase at said trustees sale, as also agreed to by the said George Gordon, I hereby convey the following property in fee simple to him the said George, and his heirs and assigns

forever, that is to say, the wharf, &c. Which said property hereby conveyed I do warrant, &c., to the said George Gordon, and his heirs, against the lawful claim of all persons." On the same day Bond and Gordon executed to Cox a deed for the part of the premises claimed by the defendant in this suit, purporting to convey the same in fee. Thereupon the counsel for the plaintiff insisted, that Gordon had, under the orginal contract between him and the defendant, such an interest as might be levied on under the *fieri facias*, and be sold under the *venditioni exponas*, or that, by the deed from the defendant of the 5th of November, 1849, Gordon acquired such an interest as was liable to be sold under the *venditioni exponas* and passed by the sheriff's sale of the 10th of November, 1849, and his deed to the lessors of the plaintiff; and that the defendant was estopped to deny their title. But the court held, that the plaintiff could not recover, and, after a verdict and judgment against him, he appealed.

A. Moore and *Heath*, for the plaintiff.

No counsel for the defendant.

RUFFIN, C. J. No title passed by the sheriff's sale. When the vendor retains the title, as a security for the purchase money, and a balance remains due, the vendee has not such a trust as is made liable to execution by the 1st section of the act of 1812, so as to divest the legal title of the vendor. That was settled as soon as the act passed. Consequently the constable's levy was ineffectual, at the time it was made and returned. It follows, likewise, that the sale under the *venditioni exponas* was equally inoperative, notwithstanding the debtor may have acquired the legal title, while the sheriff had the latter writ in his hands. The case may be considered, as if the *fieri facias* had been issued from a court of record and directed to the sheriff. The debtor's interest in the premises could

not have been sold or taken under it, at any time before its return, inasmuch as it was not subject to execution; and, if there had been a sale under the *fieri facias*, the subsequently acquired legal estate would have been unaffected by it, because the law only sells estates under its process, and not the chances of an estoppel. *Flynn* v. *Williams*, 1 Ire., 509; *Gentry* v. *Wagstaff*, 3 Dev., 270. It must be the same with the sale under the *venditioni exponas*, since that was founded upon the levy, which was made and returned, when the debtor had no estate. That results from the effects of a *fieri facias* on land and from the peculiarity of the *venditioni exponas*. The levy of the *fieri facias* does not vest either the title or the possession of land in the sheriff, but merely confers on him the power to sell the debtor's estate or interest, such as it is, while he has the writ in his hands before the return day. *Barden* v. *McKinnie*, 4 Hawks., 279. If a title accrue to the debtor after the levy, but while the *fi. fa.* is in force, no doubt it may be sold, and will pass by the sale of the land, simply, without special reference to the new title; for it is within the mandate of the writ under which the sale is made. That may be true, also, when a sale was not made on the *fi. fa.*, but on a *venditioni exponas*, but a title accrued to the debtor between the levy and the return of the *fi fa.* But it seems clear, that the *venditioni exponas* does not attach to an estate, acquired by the debtor after the return of the *fieri facias*. In respect to chattels, that writ confers no authority to take or even sell them, but is merely to compel the sale of property before vested in the sheriff and in his possession, which he might sell without the writ. It is, indeed, otherwise in respect to realty. There the office of the writ is to confer an authority on the sheriff, as well as to compel him to sell. But it is not an aut ority to take anything. It is merely to sell the land, and that only, which the levy of the *fieri facias* placed in *custodia legis*, and appropriated to the satisfac-

tion of the debt, and which is identified in the writ. The *venditioni exponas*, therefore, relates to the *fieri facias*, and is a warrant to the sheriff to do then, what he might have done under the *fieri facias*, while it was in force; and it can have no other effect. *Tarkinton* v. *Alexander*, 2 Dev. & Bat., 87; *Smith* v. *Spencer*, 3 Ire., 265. The levy of the *fieri facias* created a specific lien on the estate of the debtor as it was at the teste of the writ and at any time between the teste and the return, which could not be enforced by virtue of the *fieri facias*, itself, as it might be as to personals, but required a *venditioni exponas* for that purpose. Still the latter writ gave no more power to sell than the sheriff once had under the *fieri facias*, if he had exercised it, when he had the *fieri facias;* because its object is only to have a sale of what was lawfully taken on the *fieri facias*, and nothing more. An estate in this land, which accrued after the *venditioni exponas* sued, is therefore no more subject to it than any other tract of land, purchased out and out in the interim, would be; for in a legal sense, the one was no more levied on than the other. It is unnecessary, therefore, to enquire into the operation of the deeds between the defendant and Gordon, and Bond; for supposing Gordon to have gained a title thereby, which was liable to execution, it was not liable to the particular execution, under which it was sold. For that reason the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

DOE ON DEMISE OF HENRY BULLARD v. GEORGE T. BARKSDALE.

It is established, as a general proposition, that from a long and peaceable possession of land, upon a claim of the right, a presumption arises, that the possession was rightful, and therefore was under such grant, deeds and assurances, as are necessary to impart to it that character.

The presumption is not deduced as an inference of fact from the possession, as evidence merely and according to its influence on the minds of the jury, in producing, or failing to produce, a conviction, that the presumption is according to the truth, but the deduction is made, without regard to the very fact, by a rule in the law of evidence.

The force of this presumption is not destroyed or in any degree repelled by evidence, which renders it probable, that, in truth, a grant was not issued.

The grant is presumed, not because the jury believed that one issued, but because there is no proof, that it did not issue; indeed, in the nature of things, it would seem, that there can be no sufficient negative proof of the kind supposed.

Where a long possession, under a claim of title by a grant, as in this case of forty-seven years, has been proved, and to rebut the presumption it was shewn that the party so claiming was unable to produce a grant, declared his belief that it never existed, and made efforts to obtain another grant; the court ought not to have submitted to the jury, upon this evidence, to find whether there was a grant or not, but should have instructed them, that, from the possession alleged, they should presume a grant, and, as matter of law, that there was no evidence to oppose and repel the presumption.

The cases of *Reed* v. *Earnhart*, 10 Ire., 516, and *Hurly* v. *Morgan*, 1 Dev. & Bat., 425, cited and approved.

Appeal from the Superior Court of Law of SAMPSON County, at the Fall Term, 1850, his Honor, Judge *Battle*, presiding.

This was an action of ejectment.

The premises are situate in Sampson county and con-

tain 440 acres, and were granted to the lessor of the plaintiff in 1845, who instituted this suit in May, 1846: the defendant gave evidence at the trial, that, in 1847, he purchased the premises from a person then in possession, and immediately entered and had been in actual possession of them ever since, and that his vendor and those, under whom he claimed, had been in the actual continued possession of the premises from the year 1777 to 1847, claiming them as their own, under known and visible boundaries. On the part of the plaintiff, evidence was then given, that, in 1844, the defendant said he could not find a grant for the land, and that one Black, a surveyor, had said to him, that some one might trouble him, and advised him to enter it and get a grant; that the defendant accordingly made an entry (after that of the lessor of the plaintiff) and took out a warrant and had his survey made and sent it to Raleigh by a messenger in haste, for the purpose of being before the lessor of the plaintiff in getting a grant, if he could.

The counsel for the defendant insisted that, by reason of the long continued and peaceable possession of the premises by the defendant, and those under whom he came in, claiming them as their own, a presumption of a grant from the state, prior to that made to the lessor of the plaintiff, arose, and that, for that reason, the plaintiff could not recover. The court declined giving the instruction in that form, but directed the jury, that, if they believed the defendant, and those under whom he claimed, had been in possession of the land under known and visible boundaries for the period alleged by him, they were bound to presume that the defendant, or one of those under whom he claimed, had a grant for it, unless they were satisfied from other evidence offered, that, in fact, no such grant existed.

The counsel for the defendant further moved the court to instruct the jury that, if they found such a possession, on which a grant was to be presumed by them according to the foregoing instruction, there was no other evidence offered in this case, which could rebut that presumption, and that the defendant was entitled to a verdict. But the court refused to give this instruction, and directed the jury that the declarations and acts of the defendant, respecting a grant, were evidence tending to rebut the presumption, which was proper to be considered by the jury, and the court would not intimate an opinion, whether it was sufficient for that purpose, but that the jury were the judges of its weight, and were to consider, whether those declarations and acts were the results of knowledge or of ignorance and mistake in the defendant, as one might by mistake admit that he had no title, when he had a good one. There was a verdict for the plaintiff, on which judgment was entered, and the defendant appealed.

D. Reid, with whom was *Dobbin*, for the plaintiff, submitted the following argument:

Presumption of legal title, by grant or otherwise, founded on great length of possession, is not conclusive; in other words it is not an inference of law, to be made by the courts, yet it is an inference which the courts advise juries to make, whenever the presumption stands unrebutted by contrary evidence.

There are two kinds of presumptions, the one a conclusive presumption of law, which cannot be contradicted; the other a species of evidence. 1 Starkie on Ev., 78. For instance, the law raises a *conclusive* presumption of title on an adverse possession of twenty-one years under color of title, but long adverse possession without color of title is only *evidence* from which a title may be inferred.

In *Fitzrandolph* v. *Norman*, N. C. Term Rep., 131, Chief Justice TAYLOR says: "There is a distinction made by the law, between length of time operating as a positive bar, and that which is only used by way of evidence. The first is conclusive upon courts and juries, but when length of time is relied upon as evidence, the jury will believe it or not, according to the attending circumstances." In the same case, SEAWELL, Judge, says, "a possession was a *circumstance* and nothing more, from which the law warranted the jury in presuming a grant." This is the leading case in this state, and has been frequently cited by this Court with approbation. *Candler* v. *Lunsford*, 4 Dev. & Bat., 407; *Wallace* v. *Maxwell*, 7 Ire., 135; *Reed* v. *Earnhart*, 10 Ire., 516; *Rodgers* v. *Mabe*, 4 Dev., 180. In this latter case, RUFFIN, Chief Justice, observes, "the jury should have been told, (here the possession was upwards of forty years) that they ought to presume it, (grant) unless from the other evidence, they were satisfied a grant did not issue. In this state, time does not as yet constitute title, unless it be of that particular kind created by statutes limiting actions on rights; in all other cases it is evidence."

The English authorities are to this extent: grants from the Crown, *may*, after great length of possession, be presumed. 3 Starkie Ev., 915; Saund., 728; 1 Cowp., 110; Camp., 102.

The rule laid down in the case of *Maxwell* v. *Wallace*, 10 Ire., 110. and relied on by the counsel for the appellant, as applied to the facts of that case, is correct, but it would be extending the rule too far, to say, that in every case of long adverse possession, the law presumed a grant and the jury *ought* so to find. Lord ELDON has intimated, that the doctrine of legal presumption ought not to be extended. 6 Ves., 194. (*Evans* v. *Bicknell.*)

It is next to be inquired whether there was in this case any evidence to rebut the presumption of a grant.

The rule was adopted by the courts from principles of public policy and convenience, founded upon the supposition, that every possession is upon a claim of right, and the inadequacy of human tribunals to investigate the truth of remote transactions, and the loss and destruction of title deeds from lapse of time. Then the acknowledgment and acts of the person in possession, to whom the law presumes that the grant did issue, to the effect that he had no grant, is certainly *some* evidence, tending to rebut the presumption that the grant did issue, and had been lost or destroyed in the course of nature. Whether the evidence was sufficient in the minds of the jury to repel the presumption, was for them to consider, and is not a ground for *venire de novo.*

Strange and *W. Winslow*, for the defendant.

RUFFIN, C. J. There have been so many adjudications upon titles set up under the presumption of conveyances, from ancient and continued possession, after full discussions, that one is under no necessity of going back to the nature and grounds of the presumption, in order to consider them in detail. It is sufficient to say, that it is established, as a general proposition, that, from a long and peaceable possession, upon a claim of the right, a presumption arises that the possession was rightful, and, therefore, was under such deeds and assurances as are necessary to impart to it that character. The presumption is not deduced, as an inferance of fact, from the possession, as evidence merely and according to its influence on the minds of the jury, in producing or failing to produce, a conviction, that the presumption is according to the truth ; but the deduction is made, without regard to the very fact, by a rule in the law of evidence. It is a rule of reason and of policy, calculated to make men diligent and active in asserting their rights before proofs, once existing, may be lost,

and while there is no insuperable difficulty in ascertaining the real truth. If, indeed, one enter for a particular estate or under a particular title, and the nature of the original entry be shewn, then the presumption, that the possession, though very long, was upon a claim of the possession to the estate, does not arise as a legal inference; and it can enure to transfer the estate, only when the possession is so very long and upon a claim of right, as, with other circumstances, to induce the actual belief, that subsequent to the possession taken, there were other dealings, upon which conveyances were in fact made. That, however, concerns mainly transactions between individuals touching estates already vested in one of them; for, considering the state of our law respecting the public domain, its management and disposition to private citizens, it is seldom, if ever, to be supposed, that possession is taken of any part of it for any particular estate or purpose, which can give a character to a long possession, by which it may be disconnected from the purpose in the possessor of obtaining the absolute title from the state, or from the apparent exercise of the rights of one who is already the owner of the land by having a grant for it. The only question in such cases is, whether the possession has been long enough to justify an implication against the sovereign from the *laches* of the public servants, and the omission of private persons to appropriate the land. But it is manifest, from the necessity, which gives rise to the presumption, and from its nature, that it is not supposed to establish as a fact, that a grant was issued; and that its force is not destroyed, or in any degree repelled by evidence, which renders it probable, that in truth a grant was not issued. If that were the sort of presumption the law raises, or if it could in that way be repelled, it would poorly serve its purpose, and be, really, worth nothing. For, as to the actual probability upon the point, the facts, that the grant is not produced,

that it does not appear upon the registry in the county, and that no counterpart is enrolled in the department of state, and that no survey or entry is exhibited, nor credit for the payment of the purchase money at the treasury, would, in every case, constitute a mass of evidence, which could not fail to overturn the artificial presumption we are considering, and is in itself much stronger in its tendency to repel the presumption, than the acts and declarations of the defendant, which were offered in this case. But, as first remarked, it is hardly pretended in any case, that a grant was actually made out; for it was truly stated by Lord MANSFIELD, in *Eldridge* v. *Knott*, Cowp., 215, that the court often told the jury to presume a grant from long possession, when there was no idea that the jury believed, or the court thought they ought to believe, in the particular case, that a grant had been made, and when it was not probable it had; the fact being presumed upon a principle of quieting possessions. These probabilities to the contrary, therefore, do not at all answer the presumption. The same position is very distinctly laid down in *Reed* v. *Earnhart*, 10 Ire., 516; and in that all the Judges concurred. It is there said, that the grant is presumed, not because the jury believe that one issued, but because there is no proof, that it did not issue. Indeed, in the nature of the thing, it would seem, that there can be no sufficient negative proof of the kind supposed; for, whatever probabilities may be shewn, that there was no grant in fact; yet the probability of its existence remains, which is sufficient to serve the presumption created by long possession under a claim of title by a grant. Such a possession was admitted to exist here—being for 47 years. That constitutes a title under a presumed grant. The existence of the grant, thus presumed, is not disproved by the inability of the party to produce it, or even by his

declaration of a belief that it never existed—much less by his efforts to obtain another grant, since he might wish it, as the most direct and permanent evidence of title. Indeed, the obtaining of a new grant does not disprove the existence of a former one, nor even render it highly improbable, where there has been a long possession, as under an old grant; for, there is nothing inconsistent in a person's making sure his title by further conveyances, and especially in getting a patent, which proves itself, instead of relying on witnesses to establish an ancient possession, under a claim of right, as a foundation for presuming a grant. A second grant could only shew the party's caution and vigilance, evinced in making out a title under two distinct grants—the one presumed to have existed, and the other shewn to be existing. *Hurly* v. *Morgan*, 1 Dev. & Bat., 425. The Court therefore holds it to have been erroneous to submit this question to the jury on this evidence, as one of fact to be found by them, according to the weight they might give to the circumstances, as evidence to their minds. The instruction ought to have been, that, from the possession alleged, they should presume a grant, and, as matter of law, that there was no evidence to oppose or repel the presumption.

PER CURIAM. Judgment reversed and *venire de novo*.

THOMAS E POWELL, Adm'r &c. v. JOHN FELTON, et al.

When a man claims title under color of title and seven years' possession, it is not evidence of the adverse possession, that he had put the wife of one, who claims to be the owner of the land, in possession. When a husband is in possession, he is not deprived of it by any arrangement between his wife and a third person, pretending to own the land and to put her in possession.

The provisions of the act of 1846, ch. 1, (Pamphlet Laws) do not apply to a case, where an administrator of the deceased was appointed before the 1st of February, 1847, though that administrator be dead, and an administration *de bonis non* be granted, subsequently to that date, when the act was to go into operation.

Appeal from the Superior Court of Law of GATES County, at the Fall Term, 1850, his Honor, Judge *Caldwell*, presiding.

This is a petition filed in August, 1847, by the administrator *de bonis non* of Elisha F. Hare, to sell a tract of land under the act of 1846, ch. 1, which makes real estate personal in certain cases. The intestate died in 1846, and administration was granted in that year, to a person who died in 1847, and in August, 1847, the letters were granted to the petitioner. The intestate had no child, but left his father and brothers, and sisters, who were his heirs-at-law and are defendants. The petition states that the intestate died indebted to several persons in particular sums mentioned, and that he left no personal assets, but died seized in fee of the tract of land described in the petition, and that it was necessary to sell the same for the payment of those debts, and prays that such sale be made. The heirs-at-law made no resistance. But one

John Felton claimed the premises, under an alleged sale and conveyance made to him by one Norfleet, and applied to the county court to have an issue made up to try the title, which was allowed. On his motion the petition was then dismissed by the county court, but without any cause assigned in the record; and an appeal was taken by the petitioner. In the superior court the counsel of Felton objected, that the petition could not be sustained, because administration on the intestate's estate had been first granted in 1846, and therefore the case was not within the act. But the court held that it was within the spirit and equity of the act, and denied the motion: and a jury was then impaneled on the issue. On the trial evidence was given, that in 1824 Thomas Hare conveyed the premises in fee to the intestate, then an infant of tender years, and delivered the deed and the possession of the premises to Jesse L. Hare, the father of the intestate, to be held for his said son; and that the said Jesse L. and the intestate lived together on the premises, until the death of the latter in 1846. Felton then gave in evidence a deed for the premises, made to him by Norfleet in 1833, reciting that Norfleet had purchased the land at sheriff's sale for taxes, as the property of the intestate. And he gave further evidence that in the year 1833, he, Felton, put the wife of the said Jesse L. in possession of the premises, to hold the same during her life, and that thereafter, the said Jesse L., his wife, the intestate, and their other children, continued to live there as one family, as they had done before, until the death of the intestate, and up to the present time. And evidence was further given on the part of said Felton, that the intestate, about a year before his death, said the land belonged to said Felton.

The counsel for Felton prayed the court to instruct the jury thereon, that the possession of the premises by his

tenant, the wife of Jesse L. Hare, from the year 1833, to the death of the intestate, under the color of title constituted by the deed from Norfleet, vested the title in him. But the court refused to give that instruction, and directed the jury, that, if Jesse L. Hare took possession and held for his said son, his possession did not become opposed to his son by reason that Felton professed, as stated, to put the wife of the tenant into possession. The jury found that Felton was not entitled to the premises, and the intestate, Elisha L. Hare, was seized of the same in fee at the time of his death. After judgment against Felton for costs, he appealed.

A. Moore, for the plaintiff.
Heath, for the defendants.

RUFFIN, C. J. Besides the points made at the trial, there are others arising on the facts stated in the record, which would be worthy of consideration, if needful to the decision of the pending appeal. One, for instance, is, whether, notwithstanding the broad terms of the 13th section of the act of 1846, "when the land shall be claimed by another under any pretense whatsoever," a stranger, who sets up a title adverse to the deceased, is within the act, so as to enable the administrator to make him a party to the petition, in order to determine the property; or whether those terms are not rather to be construed in reference to the 4th, 11th, and 12th sections, and thus confined to persons "interested in the said estate" of the deceased, either as heir, devisee, mortgagee, fraudulent donee, or other person claiming under the deceased. Then, supposing that an adverse claim may be litigated in this form of proceeding, another question is, whether it must not be at the instance of the administrator, and the claim be set forth in the petition, or whether, as here, the adverse claimant may, of himself, intervene and demand

an issue upon his title. These points, however, may be passed over, since, supposing them for the appellant, the Court hold the opinion to be correct, that he has not the title to the premises, and therefore, that he has no right to a reversal of any judgment, that might have been rendered on the petition. He did not set up the deed to himself, as vesting the title in him, but only as color of title. Consequently it remained for him to shew seven years. possession, under it, adverse to the real owner; and in that he failed entirely. For, it cannot be in the least doubted, that when a husband is in possession, he is not deprived of it by any arrangement between his wife and a third person, pretending to own the land and to put her in possession. So, when the husband is in under one person, the character of his possession cannot be changed by such an arrangement and pretense, the husband not being, in fact, disturbed, but continuing to enjoy as before. If the wife could be regarded at all as Felton s tenant, yet she had no distinct possession of her own, as the husband and son were all the time on the land, and the possession would be adjudged to be with the title. Judgment was therefore properly rendered against the appellant for the costs accrued on the issue tendered by him.

As the appellant is thus put out of the case, it is not material between those parties, whether the court was right or wrong in holding this to be a proper case for the sale under the act of 1846, notwithstanding administration was first granted on the intestate's estate in 1846; for, if wrong, then in the first place, it was the appellant's folly to intervene in a matter in which no order could be made to his prejudice, and, in the next, having no title to the property, he has no interest in the question. But, as the appeal was from an interlocutory judgment on a collateral question, there can be no final judgment here, but the cause must be remanded for further proceedings between the other parties; and, as the question is raised in the

record, it seems proper the Court should give an opinion on it, in aid of the parties, upon these or other proceedings to subject the land for the intestate's debts. Upon this question, the opinion of the Court differs from that of his Honor. Both in the 4th and in the 18th sections, it is expressly provided, that the mode of proceeding prescribed in the act, shall only be in use, when the will may have been proven or letters of administration granted on or after February 1st, 1847. When there is a will there can be no mistake as to the construction ; for, without any regard to the date of the will or the period of the testator's death, or the qualification of the executor or administrator *cum testamento annexo*, the jurisdiction is determined by the period of the probate of the will, and by that alone, according to the tenor of the act. It seems plain, that the provision intended to designate explicitly some certain event, and period, for the important changes introduced, not only as to the mode of proceeding to subject real estate, but as to the application thereof or the proceeds to the debts, so that the creditors and representatives of deceased debtors might know exactly their rights and duties at the different periods, before and after that day. An administrator, with the will annexed, is thus plainly excluded, when the will was proved before February, 1847, though his letters were granted afterwards. As the reason for that provision arises out of the rights of the creditors to preferences, it follows, when the original administration was before February, 1847, that the administrator *de bonis non*, subsequently appointed, stands on the same ground with the administrator with the will annexed, above supposed. But that is put beyond all question by the additional enactment in the close of the 18th sec. that "the present mode of proceeding against real estate shall be in use, in all cases when the

will may have been proven or letters of administration granted prior to that day," that is, prior to the 1st of February, 1847. Upon the grant of the first administration, the rights of the creditors, as between themselves, were determined by the law then in force, as were also the means of obtaining satisfaction by the various legal and equitable remedies, according to the nature of the securities and of the assets, as legal or equitable; and the provisions under consideration were intended as a plain declaration, that neither those rights nor remedies were to be interfered with in any existing case or any one that might arise thereafter, provided there had been, or should be, a probate of the deceased debtor's will, if he left one, or an administrator on his estate, if intestate, before the first of February following, by which time it might be expected the new law would be generally known. Whatever obscurity may rest on other parts of the act or difficulties arise out of its provisions, those upon this point seem sufficiently plain, and show that the present case is not embraced in the act, and that it was erroneous to entertain the petition.

The decision of the Court, however, is, that there is no error in the judgment against John Felton, from which he appealed. That will be certified to the superior court, with directions to proceed, as between the other parties according to right and justice.

PER CURIAM. Ordered to be certified accordingly

THE STATE v. DARLING CHERRY.

Whether, when a man presents a pistol at another, threatening to shoot, and the pistol is not loaded, he is guilty of an assault, may admit of some question, but the man charged, clearly, cannot be excused, unless he proves that it was not loaded. The state is not bound to prove that it was loaded.

Appeal from the Superior Court of Law of MARTIN County, at the Fall Term, 1849, his Honor, Judge *Bailey*, presiding.

This was an indictment in the usual form for an assault and battery. Upon the trial it was proved, that the prosecutor was a constable and had in his hands an execution against the defendant, under which he seized a negro belonging to the defendant. Whereupon, the defendant, standing within a few feet of the prosecutor, and within carrying distance of the pistol, presented the same at the prosecutor, remarking to him, "If you do not turn that negro loose I will shoot you," by which the prosecutor was put in fear. The prosecutor did not turn the negro loose, and the defendant immediately lowered the pistol and went away.

The defendant's counsel contended, that, as it did not appear that the pistol was loaded, the defendant was not guilty. The court charged the jury, that, if they believed the facts deposed to were true, the defendant was guilty in law of an assault.

The jury found the defendant guilty of an assault, and from the judgment on the verdict the defendant appealed.

Attorney General, for the state.
Biggs, for the defendant.

PEARSON, J. When a man presents a pistol at another, threatening to shoot, he puts him in fear, and gives him a legal excuse for a battery, and it may be questioned whether the act can be excused, by proving that the pistol was not loaded; without also proving that the other person knew that fact. In this case there was no proof that the pistol was not loaded, and the question is, was the state bound to prove that it was loaded? We entirely concur with the judge in the court below. The fact, that it was not loaded is a matter of excuse, and must be proved by the defendant. The fact was within his knowledge, and as by his act, (actions, it is said, speak louder than words,) he represented the pistol to be loaded, he has no right to complain that such is *prima facie* taken to be the fact, unless he proves to the contrary.

PER CURIAM. Judgment affirmed.

THE STATE v. ANTHONY BURROWS.

The provisions of the Act of 1811, ch. 814, Rev. Code, Revised Statutes, ch. 34, sec 61, punishing the cheating by false tokens, &c., do not apply to the case of conveyances of lands.

Where the charge intended to be made in such an indictment is, that the defendant intended to cheat the plaintiff out of twenty acres of land, the excess in quantity over thirty-five acres, the indictment should expressly aver that there was, in fact, such an excess of twenty acres.

Where the true ground of complaint was, that the defendant, by means of a forged paper, induced the prosecutor to execute a deed for 35¼ acres of land instead of 55¼ acres, thereby defrauding the prosecutor, the indictment should distinctly aver this fraudulent purpose; but, though this be a fraud, it does not come within the definition of any crime or misdemeanor, known either to the common or statute law.

Appeal from the Superior Court of Law of MARTIN County, at the Fall Term, 1850, his Honor, Judge *Bailey*, presiding.

The defendant was tried upon the following indictment:

STATE OF NORTH CAROLINA, Martin County. } *Superior Court of Law*, Fall Term, 1849.

The jurors for the state upon their oath present, that Anthony Burrows, late of the county of Martin, on the first day of May, in the year of our Lord one thousand eight hundred and forty nine, with force and arms, at and in the county of Martin aforesaid, unlawfully, knowingly and designedly, a certain forged paper in writing as a true paper in the proper handwriting of one Thomas R. Cofield, falsely, fraudulently and deceitfully did exhibit to one Eli Cherry (the said Eli Cherry having theretofore agreed to sell to the said Anthony Burrows a tract of land, situate in the county of Martin, at the price of one dollar an acre,

and both the said Eli Cherry and Anthony Burrows having requested the said Thomas R. Cofield to survey the said tract, in order to ascertain the number of acres contained, and the said Thomas R. Cofield having surveyed the same and made a plat, as requested, and delivered the same to the said Anthony Burrows, to be exhibited to the said Eli Cherry, before the execution of a deed, whereby the said tract of land was to be conveyed from the said Eli Cherry to the said Anthony Burrows,) in and by which false and forged writing it was made to appear by the writing thereof that the said tract of land had been surveyed by the said Thomas R. Cofield, and contained only thirty-five and one-half acres of land, by reason of which said forged paper the said Anthony Burrows, on the day aforesaid, at and in the county aforesaid, unlawfully, knowingly and designedly, falsely, fraudulently and deceitfully did obtain a deed of conveyance from the said Eli Cherry for the tract of land aforesaid, wherein and whereby the said tract of land was described as containing thirty-five and one-half acres of land at the price of thirty-five dollars and fifty cents, and, for payment thereof to the said Eli Cherry, the said Anthony Burrows then and there executed his bond to the said Eli Cherry for the said sum of thirty-five dollars and fifty cents, with the intent then and there to cheat and defraud the said Eli Cherry of twenty acres of said tract of land of the value of twenty dollars; Whereas, in truth and in fact, the said plat and survey so made as aforesaid by the said Thomas R. Cofield, when delivered to the said Anthony Burrows by the said Thomas R. Cofield as aforesaid, did represent the said tract of land to contain fifty-five and one half acres of land, and the said Anthony Burrows, after the said plat came to his hands and before he exhibited it to the said Eli Cherry as aforesaid, at and in

the county aforesaid, unlawfully, knowingly, designedly, falsely, fraudulently and deceitfully did alter and change the writing of the said Thomas R. Cofield on the said plat, so that the said tract, by means of the said alteration and change, was described as containing only thirty-five and one-half acres, to the great damage and deception of the said Eli Cherry, to the evil example of all others in the like case offending, against the form of the statute in such cases made and provided, and against the peace and dignity of the state."

On the trial of this indictment, upon the plea of not guilty, the evidence was, that the prosecutor, Eli Cherry, owned a tract of land in the county of Martin, and that he agreed with the defendant to sell the same to him at one dollar per acre—that they agreed upon the boundaries, but did not know the quantity, and selected one Thomas R. Cofield to survey the same to ascertain the number of acres. It was further agreed, that, after the survey was made, and the number of acres ascertained by a plat, the surveyor should hand the plat, which he had made, to the defendant, in order to procure a deed for the said land from the prosecutor—that, in pursuance of the said agreement, Cofield, (accompanied by the prosecutor and the defendant,) surveyed the said tract of land, made a plat by lines, words and figures, and found that it contained fifty-five and one-half acres of land—that the said plat contained within its course and distance, and about the middle thereof, the figures and letter 55½ A.—that the plat, with these figures upon it, was handed to the defendant—that, while the plat was in the defendant's possession, he said to a witness, "How easy it would be to alter the figure 5 into a 3, and that he would do so; and the witness must say nothing about it." The defendant afterwards handed the plat to the prosecutor, with the first figure 5 of the figures 55½ changed into the figure 3, so as to represent by the said figures 35½ acres of land,

instead of 55½ acres. The prosecutor examined the same, and believing the land contained but 35½ acres, and believing that was the plat made by the surveyor, Cofield, and having no suspicion that it had been altered, agreed with the defendant to execute a deed to him for the land embraced within the said plat. A paper writing was prepared, conveying to the defendant the land embraced within the courses and distances of the said plat, and described as conveying thirty-five and one-half acres only, when it conveyed fifty-five and one-half acres, in consideration of thirty-five dollars and fifty cents paid by the defendant to the prosecutor. The courses and distances mentioned in the deed were the same as those mentioned in the plat, with the exception of the distance of one line, as to the number of poles in the said line. The number of poles in the said line was left blank, at the request of the defendant; but there were trees at the beginning and termination of the said line, which trees were marked by the surveyor, and agreed upon by the prosecutor and defendant as the correct *termini* of the said line. The paper writing, thus prepared, was executed by the prosecutor and delivered to the defendant as his deed, with a request that the blank should be filled up shortly thereafter, because he (the prosecutor) was fearful that he (the defendant) would run beyond the line into his (the prosecutor's) land. The courses, the lines and distances of the said plat were correctly made and laid down on the said plat by the surveyor. The name of the surveyor was not to the said plat, but it was all in his handwriting except the figure 3 substituted for the figure 5.

The defendant's counsel objected, that there was a variance between the proof and the charge in the bill of indictment—that, according to the proof, it did not appear, that by "the false and forged writing, it was made by the writing thereof that the said tract of land had been surveyed by the said Thomas R. Cofield and contained only

thirty-five and one-half acres;" and further it was charged in the bill of indictment, that the fraudulent means resorted to by the defendant was with the intent to cheat and defraud Eli Cherry of twenty acres of land, whereas the proof shewed that he intended to cheat and defraud Cherry of twenty dollars and not of his land. It was further insisted by the defendant, that the number of poles being left blank, in the paper writing handed to him as the prosecutor's deed, although it appeared that the blank was afterwards filled up with the number of poles, yet it was not a deed sufficient to convey lands and tenements, because there was no evidence that the prosecutor assented to the filling up of that blank, nor was there any evidence of a re-delivery. It was further objected, that, admitting the charge in the bill of indictment to be true, it was not an indictable offence —that real estate was not embraced in the statute (Rev. Stat., ch. 24, sec. 61) by the words used or any of them, to-wit, "money, goods, property or other thing of value" —that it was not intended by these words in the statute to include any other than personal property It was further insisted, that, if it was an indictable offence under the statute, the bill of indictment was insufficient. 1st. Because the bill of indictment did not negative the allegation that the plat was forged and was made to appear as containing thirty-five and one-half acres of land. 2ndly. It was not alleged, nor did it appear by the bill, except by inference, that the deed conveyed more, or the plat actually embraced more, than thirty-five and one-half acres, and further, that it is nowhere alleged, that the land conveyed to the defendant was the land of the prosecutor; and, if it did not belong to him or was not conveyed with warranty, he was not and could not be defrauded.

The questions at law, which could be urged in arrest of judgment, were reserved by the court. The court summed up the evidence and charged the jury, that if the

prosecutor agreed to sell a tract of land, which he owned, and the defendant agreed to purchase the same, at the price of one dollar per acre, and they selected the witness, Thomas R. Cofield, to make a survey to ascertain the quantity, and the agreement was that Cofield, after making the survey and plat, should hand the plat to the defendant, in order to procure from the prosecutor a deed for the land contained in the survey; and the plat embraced 55½ acres or any number of acres over 35½, and that the defendant altered, or procured another, who altered by his consent, the figure 5, so as to make it appear, as if the plat contained 35½ acres of land instead of 55½, and this was handed to the prosecutor as a true plat, with the fraudulent design and purpose of procuring a deed from the prosecutor for all the land embraced in the said plat, and the prosecutor, being misled and deceived by the defendant, and supposing that the plat exhibited to him contained but thirty-five and one-half acres, executed a deed to the defendant, by which he conveyed to him fifty-five and one-half acres, or any number of acres over and above thirty-five and one-half, in consideration of thirty-five and one-half dollars paid by the defendant, the defendant would be guilty of cheating and defrauding the prosecutor of twenty acres of land, or the amount over and above the thirty-five and one-half acres, which he paid for, as charged in the bill of indictment; and that, although a blank was left in the paper writing, as to the number of poles of one of the lines, if the points of beginning and termination of the said line were fixed upon and agreed to by the prosecutor and the defendant, and marked by the surveyor as the *temini* of the said line, and the paper was handed to the defendant as the act and deed of the prosecutor, it was in law a valid deed to convey the land embraced in its boundaries, although the blank was filled up afterwards by the defendant, in the absence of the prosecutor and without any re-delivery by him.

The jury found the defendant guilty. The defendant moved for a new trial for misdirection, which was refused. He then moved in arrest of judgment, which last motion was sustained, and the judgment was arrested. Both the defendant and the Attorney General prayed an appeal, which was allowed.

Attorney General for the state.
Briggs and *Rodman*, for the defendant.

PEARSON, J. The judgment was properly arrested. There are three fatal objections to the indictment, 1st. Land is not included within the operation of the statute. It is true the words are very general: "Money, goods, property, or *other things of value*," "or any bank note, check or order for the payment of money, &c." But they must be construed, with reference to the nature of the offence, the mischief intended to be guarded against, and the particular terms used in connection with the general terms. Larceny at common law was confined to "goods and chattels," it did not extend to land, because land could not be feloniously taken and carried away, except insignificant parcels thereof, and there was no mischief complained of in that regard. By the act of 1811, ch. 814, Rev. Code., Rev. Stat., ch. 84, sec. 23, larceny is extended, so as to include "any bank note, check or order for the payment of money issued by or drawn on any bank or other society or corporation within this state or within any of the United States, &c." The 24 sec. includes corn, wheat, cotton, rice, &c., growing or standing together in any field, &c.; this was necessary because these articles, being attached to the land, did not fall within the rule at common law, but, it was supposed, fell within the mischief to be guarded against.

By the *same act of* 1811, ch. 814, Rev. Stat., ch. 34, sec. 61, it is provided, that, "if any person shall know-

ingly and designedly by means of any forged counterfeit paper, &c., obtain from any person, &c., any money, goods, property or other things of value, in any bank note, &c., check or order for the payment of money, issued by, or drawn on any bank or other society or corporation within this state or any of the United States, &c.," and goes on in the *very words* of the 23 sec. and concludes by subjecting the party offending to the pillory, public whipping not exceeding thirty-nine lashes, &c., the appropriate punishment of larceny.

Thus we are furnished with a key, whereby to unlock the meaning of the statute. It was justly considered as great a mischief to be defrauded of property by means of a forged or counterfeit paper, &c., as to be deprived of it by means of a felonious taking, and carrying away, and the object was to extend the principle to cases, where property was obtained in this fraudulent manner. Money, goods and chattels, were included in common law larceny, and bank notes, checks or orders, &c., were included in larceny as extended by statute; so the same statute under consideration is made in express terms to embrace all of these; it may be that "*other things of value*," was inserted to include corn, wheat, &c., growing, and standing ungathered, but it would be a strained construction to make it include *the very land*, for that is not the subject of larceny, at common law, and as extended by the statute. It would be, to make the corollary or sequent embrace a subject not embraced by the original proposition, which is bad logic as well as bad law.

2nd. The land was bargained for by metes and bounds, and the deed is made corresponding thereto. The charge is, that the defendant cheated Cherry out of twenty acres of land, to-wit, the excess in quantity over thirty-five and one-half acres. But there is no averment that, in point of fact, the tract of land contained more than that number of acres; so *non constat*, that he cheated him out of

any land, and he certainly did not do it, unless the tract really contained more than that quantity. It is true, the indictment was that the plat, made by Cofield, represented the said tract of land to contain 55½ acres, and that the defendant altered the plat, so as to make it 35½ acres, but that does not make good the charge, of cheating Cherry out of the excess over 35½ acres, without a direct avowal of the existence of such an excess; it may be the plat was incorrect, and that the tract contained but 35½ acres or a less number; and, if so, Cherry was not cheated out of any land, the plat to the contrary notwithstanding.

3rd. The intent charged is "to cheat and defraud the said Cherry of twenty acres of said tract of land, of the value of twenty dollars." It seems to us, the indictment does not "fit" the case. No more land was conveyed than was agreed upon by the original contract: so Cherry was not cheated out of any land. We do not adopt the suggestion, that the indictment should have charged the intent, to cheat Cherry out of "*twenty dollars.*" He never had the twenty dollars, and therefore it could not be said, that the intent of the defendant was "to obtain" from him that sum by means of the forged paper. The true ground of complaint is, that the defendant, by means of the forged paper, induced Cherry to *execute a deed* for 55½ acres of land upon the receipt of $35½, and thereby obtained the conveyance without paying for twenty acres of land; so the fraudulent intent was to procure the deed upon the payment of $35½, instead of $55½. This is a fraud, but it does not come within the definition of any crime or misdemeanor, known either to the common or statute law. There is no error. This opinion will be certified.

PER CURIAM. Ordered to be certified accordingly.

PETER ADAMS v. HICKORY NUT TURNPIKE COMPANY.

The true construction of the Act of Assembly, incorporating the Hickory Nut Turnpike Company, is, that the state road, where it crosses the Blue Ridge at the Hickory Nut Gap, is not abrogated by the said charter, but is to be continued and kept in repair by the road overseers in their respective counties, until the turnpike is completed, and that the company, for the purpose of constructing the turnpike, has the privilege, when it is located along the state road, to enter upon it, and obstruct it, when, where, and as long as is reasonably necessary, to enable them to make their improvements, and, when it is located near the state road, the same privilege is conferred, to be exercised in a reasonable manner, in reference to the interest of the company and the convenience of the public, the latter being made, for a reasonable time, to give place to the former.

Appeal from the Superior Court of Law of GUILFORD County, at the Fall Term, 1850, his Honor, Judge *Manly*, presiding.

H. W. Miller, for the plaintiff.

Bynum and *Kerr*, for the defendant.

PEARSON, J. The plaintiff was a contractor, for carrying the mail in stage coaches, from Salisbury to Asheville, his route passing along the state road from Rutherford to Buncombe, crossing the Blue Ridge at the Hickory Nut Gap. This was case for damages, by reason of obstructions placed in the road by the defendants, whereby the plaintiff's stages were frequently detained and in one instance a stage upset.

The defense was, that by virtue of an act of the General Assembly, the defendant had a right to shut up the

part of the State road where the damage was occasioned, during the time allowed by said act for the construction of a turnpike; that part of the State road being "abrogated" by a grant to the defendants. His Honor, in making up the case, says, "The only question intended to be raised in this case is, whether the turnpike company, by virtue of their charter, had a right to close up the old road, and keep it closed at pleasure." His opinion was against the defendants upon this point, and to this they except. The case is made in reference to this point alone, and we are therefore confined to it.

The act incorporates the company with a capital of $10,000, "for the purpose of making and keeping in repair a turnpike road, commencing at Cove Creek bridge in Rutherford county, thence *along or near the State road*, crossing the Blue Ridge at Hickory Nut Gap, to Joseph Gavin's in Buncombe county." "The company shall have power to appoint commissioners to lay off and mark the location of said road." "The commissioners shall have power to assess damage in favor of any person, through whose land said road may pass. The road shall be twenty feet wide, clear of obstructions, except where side cuttings may be necessary, in which case it may be twelve feet wide. The ascent or descent of no part of the road shall exceed one foot perpendicular to ten feet horizontal. *When* the road *shall be received* by a commissioner appointed by each of the county courts of Rutherford and Buncombe, to examine and receive so much of said road, as may be situate in their respective counties, then it may be lawful for said company to erect a toll gate, &c. The said road shall be, and is hereby declared to be a public highway, *when completed*. The charter to be null and void, unless carried into effect within two years from its passage."

It was expected that the turnpike would in some places pass along the State road, in others near it, and in others

diverge from it. But it was to cross the mountain at the same gap. The purpose was to improve the communication across the mountain, between the points designated, and the turnpike, *when completed*, was to be a public highway and take the place of that part of the State road, so as to connect the other two ends, and such part was then to be discontinued, because so far as the public was concerned, it would be no longer necessary to burthen the counties by keeping it up; and so far as the company was concerned their profits would be interfered with.

But the defendants take higher ground, and insist, that this part of the State road was "abrogated" or discontinued, as soon as the turnpike was marked off and located by the commissioners, or at all events as soon as the work was commenced. They insist, that it would otherwise be impracticable to make these improvements, and from this they infer a legislative grant of this part of the State road and their right to shut it up, not when the turnpike was completed, but as soon as it was located and operations commenced. To this proposition we cannot yield our assent.

We learn from the case, that this was a part of the State road, and was used for transporting the mail, and we know, as a public matter, that this State road was one of the great thoroughfares between this State and Tennessee, and the only line of communication between Rutherford, Buncombe, and several other counties. In the absence of any express legislative enactment, discontinuing a part of this road, we believe it would be doing violence to the intention of the legislature, to discontinue it by implication, until a better road was completed and in a condition to take its place, because thereby the public would be subjected to a grevious inconvenience, and the interest of the company does not imperatively call for it, until they can demand toll.

The true construction of the charter, taking it altogether, is, that this part of the state road is to be continued and kept in repair by the road overseers in their respective counties, until the turnpike is completed, and that the company, for the purpose of constructing the turnpike, has the privilege, when it is located along the state road, to enter upon it and obstruct it, when, where, and as long as is reasonably necessary, to enable them to make their improvements, and, when it is located near the state road, the same privilege is conferred, to be exercised in a reasonable manner, in reference to the interest of the company and the convenience of the public, the latter being made for a reasonable time to give place to the former.

If a company is incorporated to improve the navigation of a river, already used for some purposes, for flat bottomed boats or to raft timber for instance, there can be no inference of an abrogation of the right of navigation, and of a right on the part of the company to stop it, except so far as it may be reasonably necessary to enable the company to make their improvements; for the object is not to discontinue, but improve, the navigation, thus shewing that the legislature is aware of the importance of the communication, and therefore cannot be presumed to intend to deprive the public of it, except so far as is reasonably necessary to make the improvements. So, in this case, the object being, not to discontinue but to improve, a part of the road, it is to be presumed that the legislature intended the public to use it as a highway, so far as such use is not inconsistent with the rights of the company, exercised in a reasonable manner, until there is a better road to take its place.

PER CURIAM. Judgment affirmed.

THOMAS P. DEVEREUX v. HENRY K. BURGWIN, et al.

Tenants in common agreed to a division of their land, and covenanted that it should be referred to A. and B. to value their respective parts, and that the party refusing to abide by the award should pay a certain sum, as *stipulated damages*, and not as a penalty. The covenant further provided, that "the valuation should be made upon such examinations and surveys, as the referees might think proper, of which they were to be the sole and exclusive judges." The award having been made and one of the parties objecting; *it was held*, upon a suit for the stipulated damages, that the award was good, notwithstanding but one of the referees made the survey, the other relying upon such survey and on his own previous knowledge of the land, the referees having, by the terms of submission, a discretionary power to make such surveys as they might think proper;

Held, further, that the award cannot be impeached in a *court of law*, by shewing that it was procured to be made, unfairly and by the exertion of undue influence;

Held, further, that the award cannot be impeached by shewing, that, after the submission, one of the arbitrators had become addicted to intemperance, to such an extent as to impair his mind, unless it be further shown, that, at the time he made his award, he was so drunk as not to know what he was doing, or his intemperance had been carried to such an extent, as to reduce him to a state of *fatuity*, so that he had no mind.

These two last conclusions do not apply to cases, where the award is made under a rule of court. There, the court retains a supervising power, and will see that the award was not obtained by unfairness or undue means, when a summary judgment is moved for.

The party, who sues to recover the stipulated damages, is not entitled to claim interest, even from the date of his writ.

In England the rule is, that interest is to be allowed, where there has been an express provision to pay interest, or where such promise is to be *implied* from the usage of trade, or other circumstances. But for goods sold, money lent, money paid, work and labor done, or on a guarantee, interest is not allowed unless there be an express or implied agreement. Our decisions have extended the rule, and for money lent, or money paid or had and received, or due on an account stated, the jury ought to be instructed to allow interest, the promise to pay being implied from the nature of the transaction. And in trover and trespass *de bonis asportatis*, the jury may, in their

discretion, allow interest upon the value, from the time of the conversion or seizure, as a part of the damages, so as to compel the wrong-doer to make full compensation, by charging him with the price, as at a *cash sale*.

When both parties appeal from a judgment, the clerks of the superior courts must make out two transcripts, so as constitute, as there really are, two cases in the Supreme Court. When this is neglected, the clerk of the Supreme Court will state two cases on his docket, and charge costs in each case.

The cases of the *State* v. *Blount*, 1 Hay., 4, and *Hunt* v. *Jucks*, 1 Hay., 173, cited and approved.

Appeal from the Superior Court of Law of NORTHAMPTON County, at the Fall Term, 1849, his Honor, Judge *Bailey*, presiding.

B. F. Moore and *Winston, Sen.*, for the plaintiff.
J. H. Bryan, *Barnes* and *Smith*, for the defendants.

PEARSON, J. The parties, being tenants in common of valuable real estate, agreed upon a division, and executed a covenant to submit the valuation of the respective parts to the arbitration of Mr. Britton and Mr. Smith; but it was agreed, that either party might refuse to abide by the award, in which event the party refusing was to pay to the other the sum of $1,000, which sum was declared to be *stipulated damages*, and not a penalty. The arbitrators made their award, and the defendants refused to abide by it; whereupon the plaintiff brings this action to recover the $1,000.

In the covenant of submission, there is this clause: "The valuation to be made upon such examinations and surveys as the referees may think proper, of which they shall be the sole and exclusive judges."

The defendants, under the plea of "no award," offered

to prove, that Smith did not go upon the land or make any examination of the premises; and insisted, that the award had not been made according to the terms of the submission. They also offered to prove, that the plaintiff had interfered with one of the arbitrators and exerted undue influence over him; and insisted, that the award was not valid, because it had been procured by unfairness on the part of the plaintiff. They also offered to prove, that, after the submission, Mr. Britton had become addicted to intemperance to such an extent as to impair his mind; and insisted, that, for this reason, the award was not valid and was void.

His Honor rejected the evidence as immaterial, and not tending to establish the issue. To this the defendants excepted.

There is no error. By the terms of the submission, the arbitrators were to make such examination and surveys, as they might think proper; and of this they were to be the exclusive judges. Language could not be more definite; and if the arbitrators thought proper to have the examination and surveys made by one of them alone, the other depending upon his own prior knowledge of the premises, and the report of his fellow, as to the number of acres in the different tracts and the quantity of river bottom, second bottom, swash and upland, in the several tracts, the parties had no right to complain, because the arbitrators in so doing acted within the terms of the agreement. There is then "*an award*"—the decision of judges of the parties' own choosing, acting within their jurisdiction (so to call it) on the terms of the submission.

The next question is, can this (judgment or) award be impeached in a *court of law*, by proving, that it was procured to be made unfairly and by the exertion of undue influence? It is clearly settled to the contrary:

Upon the same principle, that, under the plea of "*non est factum*," if the execution of the deed is proven, it cannot be avoided in a court of law by proof, that it was *procured to be* executed by means of falsehood and misrepresentation or other fraud. There must be fraud *in the* "*factum*," as by substituting one paper instead of the one intended to be executed, so as to shew, that the party did not intend to execute the paper he was thus made to sign, seal and deliver as his deed.

We also concur with his Honor on the third question. If it be proven, that at the time an arbitrator made his award, he was so drunk as not to know what he was doing, or if his intemperance had been carried to such an extent as to reduce him to a state of *fatuity*, so that he had no mind, ; it may be, that a court of law would pronounce a paper, signed by him and purporting to be his award, to be in fact no award, for the want of a legal capacity to make one; in the same way, that a paper, signed, sealed and delivered under such circumstances, is *not the deed* of the party.

The defendants did not pretend to be able to make any such proof, but offered merely to shew, that his "mind was impaired"—was not as strong and vigorous as it had been. This might have given either party a right to insist upon substituting another arbitrator in his stead, but it ought not to have been heard as ground to avoid the award.

These conclusions, of course, do not apply to cases, where the award is made under a rule of court. There, the court retains a supervising power, and will see that the award was not obtained by unfairness or undue means, when a summary judgment is moved for.

The judgment is affirmed, so far as it is appealed from by the defendants.

The plaintiff insisted, that he was entitled to interest upon the $1,000, from the time the defendants refused to abide by the award—if not, from the time he filed his bill

(which bill was filed to compel the specific execution of the contract)—if not, at least from the time his writ issued. His Honor refused to allow any interest whatever; and to this the plaintiff excepts, and he also appealed. There is no error. It is clear, the plaintiff had no claim to interest, at all events until after the proceeding in equity was determined; for, by his bill, he seeks a specific performance of the contract, and insists, that the defendants had forfeited their right to refuse to abide by the award and pay the $1,000 stipulated damage, on account of their laches in refusing to say, definitely, whether they would or would not abide by the award, and pending his proceeding in equity, he would not have received the $1,000. How can he claim interest for the time, during which he was denying the right of the defendants to pay the money? See 5 Ire. Eq., 351. But we do not think he is entitled to interest even from the date of his writ. The act of 1786, Rev. Stat., ch. 13, sec. 4, provides, that all bonds, &c., and signed accounts shall bear interest. This act is amended in 1808, Rev. Stat., ch. 31, sec. 96, directing the clerk, upon judgments by default, to calculate interest without a jury of inquiry. We do not consider this act changes the law, in regard to interest, in cases where it was allowed before, which do not come within its provisions.

The question then is, independent of this statute, is interest allowed by law in cases like the one under consideration?

Interest is allowed, where there has been an express provision to pay interest, or where such promise is *to be implied* from the usage of trade, or other circumstances. 2 B. & C., 349, *Higgins* v. *Sargent.* For instance, where a party agrees to give a note on a contract for goods or otherwise, and fails to give it—he is liable for interest from the time such note would have arrived at maturity. But for goods sold, money lent, money paid, work and labor done, or on a guarantee, interest is not allowed,

unless there be an express or implied agreement. This is the rule according to the English cases. Our decisions have extended the rule, and for money lent, or money paid, or had and received, or due on an account stated, the jury ought to be instructed to allow interest—the promise to pay being implied from the nature of the transaction; *State* v. *Blount*, 1 Hay., 4; *Hunt* v. *Jucks*, id., 173; and in trover and trespass *de bonis asportatis*, the jury may in their discretion allow interest upon the value, from the time of the conversion or seizure, as a *part* of the damages, so as to compel the wrong-doer to make full compensation by charging him with the price, as at a *cash sale*.

We are not at liberty to relax the rule any further; and to allow interest in this case would carry relaxation to the extreme.

The defendants have not had the money or the property of the plaintiff. It is true, the plaintiff has sustained damage to some extent, but the parties have not left the amount to be ascertained by a jury. They preferred to fix it themselves, and, in the absence of any stipulation for interest, there is no principle, by which the plaintiff has a right to call on the court to allow interest, or to leave it to the discretion of the jury to do so. For, the amount of damage is fixed; and the jury cannot enter into the consideration of the question of damage, so as to increase it, unless they were also at liberty to lessen it.

The judgment must be affirmed, so far as it is appealed from by the plaintiff.

In this case exceptions were taken by both plaintiff and defendant—both parties appealed, and the judgment is affirmed as against both of the appellants. This raises a difficulty as to the costs. To prevent a recurrence of the same difficulty, and to prevent cases from being made too complicated, the clerks of the superior courts will in future, when both parties appeal, make out two transcripts, so as

to make, as there really are, two cases in this Court. In this case, the clerk of this Court will state two cases on his docket, and charge costs against the appellant in each case.

PER CURIAM. Judgment accordingly.

THE STATE to the use of BURTON W. HATHAWAY v. JAMES N. FLOYD, et al.

A householder, who wishes to avail himself of the provisions of the Act of Assembly of 1844-5, ch. 32, Ire. Digested Manual, p. 118, may do so, by making application and procuring the assignment to be made according to the Act of Assembly, at any time, even after a levy of an execution or attachment before the property is changed or converted by a sale.

Appeal from the Superior Court of Law of CHOWAN County, at a Special Term in December, 1850, his Honor, Judge *Battle*, presiding.

This was an action of debt, on a bond executed by the defendant, Floyd, and the other defendants, as his sureties, on his being appointed a constable of Chowan county. The plaintiff produced and proved the execution of the bond; and shewed that he sued out, and placed in the hands of the defendant, Floyd, an attachment against one Caffee, an absconding debtor; that the same was levied by Floyd on goods and chattels of the defendant therein, sufficient to satisfy the amount of the attachment; that final judgment was regularly had thereon, the goods and chattels condemned, and a *venditioni exponas* awarded, which was also placed in the hands of the defendant,

Floyd. Floyd was proved to have been a constable for the said county, at the time of the issuing of the attachment and its levy, and also at the time the *venditioni exponas* came to his hands, and for some eleven months afterwards. The defendants then shewed, that, on the levying of the attachment, Floyd placed the property, by the plaintiff's directions, in the hands of a Miss White, who was a sister of Caffee's wife, and was living in his family; and that, on the award of the *venditioni* the plaintiff further directed him to let the property remain in her hands, until Caffee's return home, he being expected home by his family, and that the constable indulged accordingly. And it was further in evidence, that the plaintiff directed the defendant, Floyd, to permit the property to remain in Miss White's possession, until the 1st day of July. The plaintiff then proved, that Caffee returned home and remained some four or five days, and went off again, but there was no evidence that Floyd knew of his return or departure; and it was also proved, that he again returned and was seen by the defendant, Floyd, and remained in Chowan for some weeks. The defendants then proved that, by three freeholders and a justice of the peace, the articles levied on under the attachment and directed to be sold by the *venditioni exponas*, were assigned to the said Caffee, under the provisions of the act of 1844–5, ch. 32, Ire. Digest. Manual, p. 118. The assignment was on the 14th day of June, preceding the 1st day of July aforesaid, and after Caffee's second return, and after the seizure under the attachment and the award of the *venditioni*, and while the latter was in Floyd's possession. On this assignment being made, Floyd abandoned the control of the property.

The plaintiff contended, that none of the property was protected from this claim, for two reasons: First, that the property of an absconding debtor was not protected against an attachment, and therefore the act did not

apply ; secondly, that as the property, which consisted in part of household and kitchen furniture, in addition to beds and bedding, was divested out of the defendant, before the assignment, it was, therefore, not protected under and by virtue of the act. The defendant contended, that, under the act aforesaid, the property might be laid off at any time before an actual sale under an execution, notwithstanding a lien by execution or attachment thereon ; and that the property, under the circumstances of the case, was protected, and, supposing the evidence to be believed, the jury ought to find for the defendants. Of this opinion was the presiding Judge, and he so charged the jury, who found a verdict for the defendants. From the judgment thereon, the plaintiff appealed.

Heath, for the plaintiff.
A. Moore, for the defendants.

PEARSON, J. The failure to collect the debt is fully accounted for, by the facts stated in the case, and we concur in the opinion that the defendants were not liable.

The delay in making sale was by the order of the plaintiff, who directed the goods to be left in charge of Miss White ; and, after the debtor returned, he had a right to avail himself of the provisions of the Act of the General Assembly, passed in 1844, ch. 32—118 Iredell's Digested Manual. He was within the words of the statute, "a housekeeper," and notwithstanding the levy, had a right to have the property "laid off and assigned" as the portion to which he was entitled under the provisions of the act. The "*poor debtor*" is in time, if he makes his application and procures the assignment to be made, at any time before the property is changed and converted by a sale.

PER CURIAM. Judgment affirmed.

JOSEPH HARDY, et al. v. JOHN WILLIAMS, Adm'r.

A. and B. being infants and tenants in common of a tract of land, C. their mother, who was the administratrix of their deceased father, rented out the land to D., who entered into possession of it. The infants afterwards brought a bill in equity against C. for an account of their estate and charged her with having acted as their guardian in renting out the land, and obtained a decree for the amount ascertained to be due, including the rent; but it did not appear that the decree had been satisfied; *Held*, that D. not being a party to these proceedings in equity, nor a privy to either of the parties, could not avail himself of them, so as to prevent his being sued as a trespasser.

The case of *Hardy* v. *Williams*, 9 Ire., 177, cited and approved.

Appeal from the Superior Court of Law of BERTIE County, at the Fall Term, 1850, his Honor, Judge *Caldwell*, presiding.

This was an action of trespass *quare clausum fregit.*

It was in evidence, that the plaintiffs were seized and in possession of the *locus in quo* in the year 1841, as the heirs-at-law of their father, Edward Hardy; that they were infants and without a guardian: that Joseph Hardy, one of the plaintiffs, arrived at full age twelve months before the institution of this action; and the other plaintiff is still an infant. It was further in evidence, that Mrs. Hardy was the administratrix of said Edward Hardy; and that one William Cherry, an agent of Mrs. Hardy, rented out at public auction the *locus in quo*, and one Holly bid off the same and assigned his bid to the intestate of the defendant and the said William W. Cherry; and that the defendant's intestate and the said W. W.

Cherry entered on the premises, and, during the year 1841, cultivated the lands and used the fishery attached thereto. It was in evidence further, that, at the fall term, 1845, of Bertie court of equity, the plaintiffs, by their guardian, Humphry H. Hardy, filed their bill against Mrs. Hardy, the administratrix of the said Edward Hardy, for an account and settlement of the estate of the said Edward, in which they claimed for the rents of land received by the administratrix, and the administratrix, in her answer to the said bill, admitted, that she appointed by parol the said William W. Cherry her agent for the settlement of the said estate, and that the said Cherry had rented out the lands of the plaintiffs. An account of the said estate was taken, in which the administratrix was charged with the rents of other lands belonging to the plaintiffs, and also with the rent of the *locus in quo* for the year 1841, at the sum bid for the same by the said Holley; and, at the fall term, 1847, of the said court of equity, a decree was entered in favor of the plaintiffs against the administratrix for the balance due, as appearing upon the said account; and in which decree it is declared, that the administratrix had received the rents of lands belonging to the plaintiffs, for which she was liable to account. It did not otherwise appear, that the said Holley or the intestate of the defendant, or the said Cherry had paid the rent of the *locus in quo* to Mrs. Hardy; and there was no evidence that the said decree had been paid by the administratrix.

The court charged, that, as the plaintiffs, by their guardian, and under the sanction of a court of equity; had elected to treat their mother as guardian and charged her with the rent of the land in question, they could not now convert the defendant's intestate into a wrong-doer.

The jury returned a verdict for the defendant. Judgment for the defendant, from which the plaintiffs appealed to the Supreme Court.

Biggs, for the plaintiffs.

W. N. H. Smith, for the defendant.

PEARSON, J. The court charged "that as the plaintiffs by their guardian, and under the sanction of a court of equity, had elected to treat their mother as guardian and charged her with the rent of the land, he could not now convert the defendant's intestate into a wrong-doer." There is error.

In *Hardy* v. *Williams*, 9 Ire., 177, the same facts were presented between the same parties, in an action on the case in assumpsit for the rent of the land, and it was held that the action could not be sustained, because there was no privity between the plaintiffs, and the defendant's intestate, and, "that, although it was at the election of the plaintiffs, to treat their mother as a wrong-doer, or as their agent, they were not at liberty, by *supposing* her to be an agent, thereby to affect the rights of third *persons*, and make a privity, where none before existed."

This was a decision as to the legal effect of the proceedings and decree in equity, by the plaintiffs against Mrs. Hardy, in which she was charged with the rent of the land, and it was held that the proceedings and decree did not have the legal effect of creating a privity of contract between the plaintiffs and the defendant's intestate, because he was a *third person* and *his rights could not be affected*. For the very same reason his *liability* cannot be affected. When an attempt was made to charge him *as a privy*, he escaped upon the ground that he was a third person and not bound by those proceedings, and now, that an attempt is made to charge him as a *wrong-doer*, he cannot shift his ground, and involve the aid of those proceedings to relieve him from the position of a wrong-doer, by converting him into a privy. Estoppels must be mutual, and who is not bound by them cannot take advantage of them.

If the decree had been satisfied, then the defendant could have availed himself of it, not as an estoppel, but, a *satisfaction* of the cause of action.

PER CURIAM. Judgment reversed and *venire de novo*.

REBECCA WILSON v. QUINTON PURCELL, et al.

Property passes by a sale and delivery, notwithstanding an *executory* agreement to sell to another, and the receipt of a part of the price.

Appeal from the Superior Court of Law of ROCKINGHAM County, at the Fall Term, 1850, his Honor, Judge *Manly*, presiding.

This was an action of trover for a mare, in which it appeared, that the defendants had, on the 10th of November, 1847, converted the mare, by virtue of a process of *fi. fa.* against Urias Wilson, a son of the plaintiff.

George Wilson, a son living with his mother, testified, that he bought the mare of a man of the name of Woollen in the spring of 1847, and after trying and finding, that she worked kindly, sold her to his mother, and his mother, Urias having no animal with which to cultivate a crop, loaned the mare to him.

Henry Suthern, who worked a part of the plaintiff's farm in 1847, also testifies that George made the purchase of Woollen, and not long afterwards sold to the mother, and that the mother lent the mare to Urias.

Betsy Baker, defendants' witness, swore: that the plaintiff said, she had found out that the mare was bought

by George for Urias, and she (the mother) was angry about it, and that George should make Urias pay him for it, else she would turn him off. It was accordingly agreed between the sons, that Urias was to pay George for the mare, as he might want it. She saw a small sum paid. This witness, as well as several others, testified, that Urias worked and fed the mare during the summer of 1847.

A man by the name of Baker, also a witness in behalf of the defendants, swore, the mare was bought by Urias, and that he worked her and used her and claimed her as his property.

Pascal, another witness for the defendants, also swore, that Urias was the purchaser of the mare; that she was selected by a man named Stewart, and that Urias rode her home and claimed her as his own.

Stewart, designated by the last witness as the person, upon whose judgment the purchase was made, swore that he was not present at the sale at all, and knew nothing of it.

The defendants' counsel, in the course of his argument, when noticing the testimony of George Wilson, asked instructions from the court, to the effect, that if he was believed to be corruptly false in any material particular, his testimony should be rejected altogether. In the reply of the plaintiff's counsel, this rule for judging of witnesses was not denied, but expressly admitted to be correct.

The court in the explanation to the jury did not notice the matter, for the reason, that the court did not then, and does not now perceive, how it could be applicable to the plaintiff's witness.

In the course of his Honor's charge, he informed the jury, that if George sold and delivered the mare to his mother for a reasonable consideration, the property in the animal would pass, although George at the time might be

under a promise to let his brother Urias have the mare whenever he might pay for her, and although they might believe further, that this arrangement had been partially carried into effect by payment of a portion of the money.

This part of the charge was excepted to, because of a want of evidence to make it pertinent.

Under other instructions from the court, not objected to, the jury found a verdict in favor of the plaintiff.

Rule for a new trial was discharged.

Kerr, for the plaintiff.

Morehead and *Miller*, for the defendants.

PEARSON, J. In the course of his Honor's charge, he informed the jury, that, "if George sold and delivered the mare to his mother, for a reasonable consideration, the property in the animal would pass, although George at the time might be under a promise to let his brother Urias have the mare whenever he paid for her, and although they might believe further, that this arrangement had been partially carried into effect by payment of a portion of the money."

This part of the charge was excepted to.

His Honor announced a clear proposition of law, that property passes by a sale and delivery, notwithstanding an *executory* agreement to sell to another, and the receipt of a part of the price. This part of the charge, we think, was pertinent, and was called for, to prevent a misapprehension on the part of the jury, as to this question of law. In fact it was the point upon which the case turned.

PER CURIAM. Judgment affirmed.

DAVID WHARTON v. SOLOMON HOPKINS.

It is the settled law in this state, that a debt, due by an assignor of a bond or note at the date of the assignment, may be pleaded, as a set-off to an action by an assignee after maturity; but this departure from the statute, Rev. Stat., ch. 31, sec. 80, is put on the ground, that a liberal construction is necessary to prevent evasion and injustice.

Where it is shewn this injustice will not result, the rule is different. As when the assignor, at the date of the assignment, had an account against the defendant in the action, larger in amount than that which is attempted to be set off; *Held*, that the defendant could not avail himself of his account, as a set-off, in an action by an assignee, on a note or bond assigned after maturity.

The case of *Haywood* v. *McNair*, 3 Dev., 231; 2 Dev. & Bat., 283, cited and approved.

Appeal from the Superior Court of Law of GUILFORD County, at the Fall Term, 1850, his Honor, Judge *Manly*, presiding.

H. W. Miller, for the plaintiff.

Mendenhall and *Morehead*, for the defendant.

PEARSON, J. This was an action in case upon a promissory note. Hogg and Lindsay assigned the note sued on to the plaintiff, after maturity. The defendant relied on an account against Hogg and Lindsay, which he held at the date of the assignment, as a set-off. The plaintiff opposed this set-off by proof, that, at the time of the assignment, Hogg and Lindsay, besides the note, held an account against the defendant, of an amount greater than his account.

It was decided in the court below, that this proof defeated the set-off. After a verdict and judgment against him, the defendants appealed.

We think there is no error.

At common law, if a bill of exchange was assigned before maturity, the assignee took it subject only to endorsed credits; if, after maturity, he took it subject to any legal defense, that might have been made to it, in the hands of the assignor, at the date of the assignment; for it was dishonored, and the assignor was not allowed to evade the defense by transferring it to a third person. The Statute of Ann puts promissory notes, and our statute notes under seal, on the same footing with bills of exchange. In the meantime the statute in regard to set-offs created a new legal defense; and the question was presented whether this new defense existing against the assignor at the time of the assignment, was available against the assignee?

It is settled in England, after much hesitation, *Burrough* v. *Moss*, 10 B. & C., 558, that this new defense is not available, and that the suit of the assignee can only be met by a defense, existing against the assignor at the date of the assignment, which was *connected* with the bill, as a payment; but that a set-off of a debt against the assignor, being a thing collateral and unconnected with the bill, is not a defense at law, although the bill was assigned after maturity, because the words of the statute embrace only a mutual debt, which the defendant holds against the plaintiff, and does not extend to a debt, which he holds against the plaintiff's assignor.

It is settled in this state, that this new defense is available, and that the principle of the common law applies, so as to bring it within the *meaning* of the statute of set-offs. *Haywood* v. *McNair*, 3 Dev., 231; 2 Dev. & Bat., 283.

It is unjust to attempt to evade a defense by making a transfer of a bill or note after maturity, and the principle

applies as forcibly to a defense given by statute, as to one existing at common law. To allow any defense to be thus evaded, would be a violation of the maxim, "no man shall take advantage of his own wrong," which is as fully recognized in courts of law as in equity. It is true the set-off is not *connected* with the bill or note, and is collateral and may or may not be pleaded, as the defendant chooses; but what right has the holder to deprive him of this election? and is not a liberal construction of the statute to be adopted, when it is necessary to prevent an evasion of its enactments and a manifest wrong?

It seems to us, our court has taken the true view of the subject, and that the English Judges have fallen into the error, "*haeret in litera, haeret in cortice.*" Indeed, their decisions are not reconcilable. When a factor sells goods without disclosing his principal, in an action by the principal, the purchaser may make any defense that he could have made, if sued by the factor. He may plead, as a *set-off* to the action of the principal, a *debt due by the factor.* "The principle is, the purchaser shall not be defrauded of a legal defense, by the introduction of a third person, to whom he is a stranger." *George* v. *Clagett*, 7 T. Rep., 355. Barrington on Set-off, 44. This is a departure from the words of the statute to prevent evasion and injustice, and the reasoning would seem to call for it with much force, so as to allow, as a set-off to the action of the assignee after maturity, a debt due by the assignor. It is true the English cases take a distinction between mutual *credits* and mutual *debts*. The distinction is not substantial, when both debts are at maturity, and nothing remains to be done, but to make application of one in satisfaction of the other. If a departure from the words of the statute is justified in the former case, it must be so in the latter, where transfer is made after maturity to evade a legal defense.

Be this as it may, it is settled in this state, that a debt due by the assignor at the date of the assignment may be pleaded, as a set-off to the action by the assignee after maturity; and this departure from the words of the statute is put on the ground, that a liberal construction is made necessary to prevent evasion and injustice. And the question presented in the case under consideration, is, whether this necessity is not met and removed by proof, that, at the date of the assignment, the assignors had an account? We think this fact removes the ground for making a departure from the words of the statute, because the reason ceases. The assignors did no wrong, for they had an account, to which the set-off might be applied, and there was, consequently, no attempt to evade a legal defense.

But it is said, the defendant is deprived of his right to apply his set-off to the note or the account, as he might elect. This is true, but his legal defense is not evaded; and at the most he loses only the right of making a capricious application of his debt as a set-off, supposing him to have it. No injustice is done, for it can make no difference to him, whether he pays the note or applies his account, as a set-off to the account of the assignors, or applies his set-off to the note and pays the account. There is no evasion of his legal defense and no injustice done to him, by refusing to allow his set-off to the note, or the contrary. The negotiability of the note is not unnecessarily trammelled, by which means the assignors are enabled to raise by a transfer the money, which he ought to have paid, and the policy of the statute, which seeks to avoid a multiplicity of actions, is subserved; for, if the set-off is allowed, the assignee must sue the assignors, and they must sue the defendant, making two additional actions necessary, instead of one. The defendant's right to apply his debt to the note, or to hold it back for the account, if the suit was in the name of the assignors, is

assumed, but, as above remarked, it would be a capricious application, and he can take no benefit from it, if the assignors chose to include both causes of action in the same declaration.

Upon the same reasoning, it is held in the English cases of a sale by a factor, that, if, before all the goods are delivered, the purchaser has notice of the principal, then his set-off of a debt due by the factor will not avail, for the reason ceases; and he has no right to complain, that he is defrauded of a legal defense. "Justice is on the other side;" and there is in such cases no ground to depart from the words of the statute. Babington on set-off, 45, and the cases there cited.

Per Curiam Judgment affirmed.

JOHN McLEOD v. J. H. KIRKHAM.

In the case of a proceeding under the insolvent debtor's law, the Court has authority to permit the schedule to be amended, so as to make more certain the description of the defendant's interest in matters there set forth, at any time before the oath is administered; and if the plaintiff is surprised, it is ground for a continuance.

It is sufficient to file the evidence of the debts, set out in the schedule, which are in the possession and control of the defendant, at any time before the oath is administered.

It being a matter of public notoriety, that proclamation money is wholly worthless, it is not necessary to state in the schedule the amount thereof with nicety, or file the same.

Appeal from the Superior Court of Law of Montgomery County, at the Fall Term, 1849, his Honor, Judge *Battle*, presiding.

McLeod v. Kirkham.

This was an application to be discharged under the insolvent debtor's law.

The defendant was arrested under a writ of *ca. sa.*, returnable to this term of the superior court of law for the county of Montgomery, and gave bond for his appearance to take the benefit of the act for the relief of insolvent debtors. He accordingly issued a notice, which was regularly served upon the plaintiff, more than ten days before the first day of this term. The plaintiff objected, that the notice was insufficient, but the court overruled the objection. The defendant filed with the clerk of the court, ten days before the first day of this term, his schedule, but did not file with the said clerk the notes and other papers, therein referred to, until the second day of the term, on which day the plaintiff filed the exceptions. The court decided, that no further description of the claims to property in England or Scotland, or of the amount of the proclamation money, was necessary, but that the description of the defendant's interest in his wife's land in the county of Halifax, and his interest in the pension claims, was not sufficiently specific, and, on his motion, allowed him to amend his schedule in that particular. The amendment having been made to the schedule, the defendant, by his counsel, moved the court, that he should be allowed to swear to the same, and thereupon to be discharged. The plaintiff opposed the motion, because:

1st. The notice was insufficient.

2nd. The notes, accounts, proclamation money, &c., were not filed with the schedule ten days before the first day of the term.

3rd. The amount of the proclamation money was not sufficiently specified.

4th. The plaintiff's interest in the English claim was not sufficiently set forth.

5th. The court allowed the defendant to amend his schedule without any authority for so doing; and insisted, that he could not swear to his schedule at the term, at which the amendment is made.

6th. The defendant has not filed at all the notes and judgments against Medlin, Martindale and Campton, nor the constable's receipt for the same. The plaintiff further objects, that neither the notes, or judgments against Medlin, Martindale and Campton, nor the constable's receipt for the same, are filed at all, and, for that reason, the defendant could not take the oath.

The court overruled all these objections, and ordered, that the defendant be allowed to swear to his schedule, and thereupon to be discharged. From which order, the plaintiff prayed an appeal to the Supreme Court, which was granted.

Kelly, for the plaintiff.
Morehead, for the defendant.

Pearson, J. None of the objections to the right of the defendant, to be discharged under the insolvent law, are tenable, and there is no error.

1st. The notice, a copy of which and of the schedule was served on the plaintiff, gave full information "of the intention of the defendant to avail himself of the benefit of the act."

2nd. We think the court had authority to permit the schedule to be amended, so as to remove the objection for the want of certainty in the description of the defendant's interest in several matters there set forth, at any time before the oath was administered, and, if the plaintiff was in any way surprised, it was ground for a motion to continue.

3rd. It was sufficient to file the evidence of the debts

set out in the schedule, which were in the possession and control of the defendant, at any time before the oath was administered. There is no reason for requiring them to be filed at the same time with the schedule. It may be they are not in the defendant's possession, and every useful purpose is answered, if they are delivered at the time the discharge is moved for.

4th. The defendant assigns a sufficient reason for not filing the notes and judgments against Medlin, Martindale and Campton. The schedule set out the fact, that the papers are in the hands of one Putney, a constable in the city of Raleigh. They are thus put within the control of the officer, in whom the title is vested by force of the statute for the benefit of the creditors. There is no evidence that the defendant had a constable's receipt for those papers.

5th and 6th. It is a matter of public notoriety that proclamation money is wholly worthless and of no value, and the objection because the amount thereof is not stated with precision, and because the same was not filed, cannot be sustained.

Per Curiam. Judgment affirmed.

THE STATE v. JOHN TILGHMAN.

In order to make the declarations of a deceased person evidence, as "dying declarations," it is not necessary that the person should be *in articulo mortis* (in the very act of dying); it is sufficient if he be under the apprehension of impending dissolution, when all motive for concealment or falsehood is presumed to be absent, and the party is in a position as solemn, as if an oath had been administered.

A witness cannot be admitted to state that "he thought, the deceased thought, he would not die from his wounds." He cannot give his own opinion, but only depose to the state of the wounds of the deceased and what he *then* and *there* said and did, from which the Court may decide what he thought of his condition.

If the deceased, at the time he made the declarations, was, *in fact*, in a condition to make them competent evidence, a hope of recovery, at a subsequent time, would not render them incompetent.

There is a distinction between a cause for a *new trial* and a cause for a *mistrial*; the former is a matter of discretion—the latter a matter of law.

Where, on a trial, the circumstances are such, as merely to put suspicion on the verdict, by shewing, not that there *was*, but that there might have been, undue influence brought to bear on the jury, because there was opportunity and a chance for it; it is matter within the discretion of the presiding Judge. But *if the fact be*, that undue influence was brought to bear on the jury; as if they were fed at the charge of the prosecutor or the prisoner; or if they be solicited and advised how their verdict should be; or if they hear other evidence, than that which was offered on the trial; in all such cases, there has been, in contemplation of law, *no trial*, and this Court, as a matter of law

will direct a trial to be had, whether the former proceeding purports to have acquitted or convicted the prisoner.

Where the facts, in relation to the jury on a trial for murder, were, that the jury were placed in the charge of an officer and confined in the ordinary jury room; that they retired from the court on Thursday at 6 P. M. and rendered their verdict on Saturday at 10 A. M.; that while out, the members of the jury separated at various times to obey calls of nature—that each one separated himself from the others, more than once for this purpose, and one of them as often as six times; that, when they did this, they went, one at a time, under charge of an officer, and, during such absence, the other jurors remained together in the jury room, with the door locked; that they went about fifty yards from the court house, and returned as soon as practicable, holding no intercourse with any one; that one of the jurors separated himself from his fellows, and visited a drug store, about one hundred and fifty yards from the jury room, for the purpose of procuring medicine, being sick: that he went under the charge of an officer, and held no conversation except with the keeper of the drug store, who asked him if they had agreed on their verdict, to which he replied, "they had not;" that this store was the most public place in the town of Newberne; that another juror separated himself from his fellows and stood on the outside of the jury room, near the door closed, and conversed privately for ten or fifteen minutes with a third person, but what was said did not appear: that the jurors also ate and drank, while out, but not to excess; that a part of the time they did so with permission of the court, but when enjoined by the court not to eat or drink, they violated this injunction, contrary to the wishes of the officer, who had them in charge: that several jurors wrote notes and dropped them from the windows of the jury room, and also received notes from persons not of the jury, but neither the contents of the notes nor the names of the persons, to whom sent or from whom received, appeared; that some of the jurors conversed from the windows with persons in the street, on various subjects and about this suit, but what was said did not appear; and that some servants and small children had access to the jury room, the servants for the purpose of carrying food and clothing to the jurors, and the children to see their fathers; *Held*, that these facts might, in the discretion of the presiding Judge, have been a good cause for granting a new trial, but they could not justify the court in declaring, as a matter of law, that there was a mistrial.

The admission of dying declarations, as evidence, is not in opposition to that part of the Bill of Rights, which says, that, "In all criminal prosecutions, every man has a right to be informed of the accusation against him, and to confront the accuser, and witnesses with other testimony."

The case of the *State* v. *Miller*, 1 Dev. & Bat., 500, cited and approved.

Appeal from the Superior Court of Law of CRAVEN County, at the Fall Term, 1850, his Honor, Judge *Ellis*, presiding.

STATE *v.* TILGHMAN.

The defendant was tried for murder, upon the following indictment, to-wit:

STATE OF NORTH CAROLINA, Lenoir County, } *Superior Court of Law*, Fall Term, 1849.

The jurors for the state upon their oath present, that John Tilghman, late of the county of Lenoir, not having the fear of God before his eyes, but being moved and seduced by the instigation of the Devil, on the fifteenth day of August in the year of our Lord one thousand eight hundred and fifty, with force and arms, at and in the county of Lenoir aforesaid, in and upon one Joseph J. Tilghman, in the peace of God and the state then and there being, feloniously, wilfully, and of his malice aforethought did make an assault, and that the said John Tilghman a certain rifle, of the value of five shillings, then and there loaded and charged with gunpowder and one leaden bullet, which rifle he, the said John Tilghman, in both his hands then and there held, to, against and upon the said Joseph J. Tilghman then there feloniously, wilfully, and of his malice aforethought did shoot and discharge; and that the said John Tilghman with the leaden bullet aforesaid, out of the rifle aforesaid, then and there by force of the gunpowder, shot and sent forth as aforesaid, the said Joseph J. Tilghman in and upon the right side of the forehead of him, the said Joseph J. Tilghman, a little above the right eye of him, the said Joseph J. Tilghman, then and there feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound, giving the said Joseph J. Tilghman then and there with the leaden bullet aforesaid so as aforesaid shot, discharged and sent forth out of the rifle aforesaid by the said John Tilghman, in and upon the said right side of the forehead of him the said Joseph J. Tilghman, a little above the right eye of him the said Joseph J. Tilghman one mortal wound of the breadth of one inch and of the depth of six inches, of which said mortal wound the said Joseph J.

Tilghman then and there instantly died: And so the said jurors aforesaid upon their oath aforesaid, do say, that the said John Tilghman, the said Joseph J. Tilghman in manner and form aforesaid feloniously, wilfully and of his malice aforethought did kill and murder, against the peace and dignity of the state: And the jurors aforesaid, upon their oath aforesaid, do further present, that John Tilghman, late of the county of Lenoir and state of North Carolina, not having the fear of God before his eyes, but being moved and seduced by the instigation of the Devil, on the fifteenth day of August in the year of our Lord one thousand eight hundred and fifty, with force and arms at and in the county of Lenoir aforesaid, in and upon one Joseph J. Tilghman, in the peace of God and the state then and there being, feloniously, wilfully and of his malice aforethought did make an assault; and that he, the said John Tilghman, then and there with a certain rifle, of the value of five shillings, which he, the said John Tilghman in both his hands then and there had and held, the said Joseph J. Tilghman in and upon the right side of the head of him the said Joseph J. Tilghman then and there feloniously, wilfully and of his malice aforethonght did strike, penetrate, and wound, giving unto him, the said Joseph J. Tilghman, then and there with the said rifle by the stroke aforesaid in manner aforesaid, in and upon the right side of the head of him the said Joseph J. Tilghman, one mortal wound of the length of three inches and of the depth of three inches, of which said mortal wound the said Joseph J. Tilghman then and there instantly died; and so the jurors, aforesaid, upon their oath aforesaid, do say, that the said John Tilghman, the said Joseph J. Tilghman, in manner and form aforesaid, feloniously, wilfully and of his malice aforethought did kill and murder, against the peace and dignity of the state.

The prisoner, upon his arraignment, pleaded not guilty.

The bill was found by the grand jury of Lenoir County at the fall term, 1850, and the case was removed by the state, upon the affidavit of the solicitor, to the county of Craven, where it was tried at the present term of the court.

The solicitor called, as a witness for the state, one Joseph Wilson, who testified, that he knew the prisoner at the bar, and also the deceased, Joseph J. Tilghman: They both lived formerly in Lenoir county, where Joseph J. Tilghman died on the fifteenth day of August, A. D. 1850; that in the afternoon of that day, a few hours before night the deceased parted with the witness at a hog pen on the land of the deceased, where he had gone to feed his hogs; that the deceased started towards his dwelling house, about four hundred yards distant, and the witness went to resume his labor, at which he had been engaged a short distance from the hog pen; that, in about eight or ten minutes after the deceased left, he heard the report of a rifle gun in the direction in which the deceased had gone; that the witness, upon hearing this, walked a short distance towards the place, from whence the report emanated, when he saw the deceased walking rapidly towards his house, and apparently staggering; that he had his hat on his head at the time; that the witness returned to his work, and in a very short time thereafter heard an alarm at the house of the deceased; when he left his work and ran as speedily as he could to the house; that when he reached there he saw the deceased sitting in his door, bleeding profusely, and his wife was engaged in cutting off his hair, and in an effort to stop the flowing of blood; that the deceased had a wound on each side of his head, and one in the forehead just above the right eye, from which latter the blood was flowing; that, at the request of the deceased, witness started immediately to Kinston, about seven miles distant, for a physician, and as he started, he passed along the road,

leading from the hog pen to the house of the deceased, when he saw a wallet with corn in it lying in the road, about two or three hundred yards from the hog pen, which he recognized as the same the deceased had while feeding his hogs at the time referred to. This witness further said that he went to Kinston as soon as he could and without delay, and when he returned he saw Joseph J. Tilghman at his house, and he was then dead. The witness also stated, that upon examination the same afternoon he saw a puddle of blood in the road, leading from the hog pen to the house of the deceased, about twenty-five or thirty steps from the wallet, and nearer the hog pen; that he saw the tracks of a barefoot person, pointing both ways between the wallet and puddle of blood, and that the deceased had on no shoes when he last saw him at the hog pen; that there was no blood between the wallet and the puddle spoken of, but there were frequent marks of blood between the wallet and the house of the deceased; that there was an impression upon the ground at the place, where the puddle of blood was, similar to one made by a person lying down; that this witness lived with the deceased at the time as a laborer.

The solicitor then proposed to prove by this witness, that the deceased told him just before his death, that the defendant inflicted the wounds upon him, of which he died.

The prisoner's counsel objected to the testimony, and the court decided, that it could only be admitted as the dying declarations of the deceased, made when all hope of recovery had forsaken his mind, and when he entertained the belief, that he would speedily die from the effects of the wounds he had received, and that as yet such did not appear to be the case.

The solicitor was then permitted to lay the grounds for the admission of this evidence by calling witnesses to

prove the condition of the deceased's mind, at the time the declarations were made.

For this purpose Dr. Woodley was called by the State, who testified, that he called to see the deceased on the fifteenth day of August last at the summons of the witness, Wilson; that he found him dead when he reached his house; that the deceased had a wound two and three-fourths or three inches long on the left side of the head, laying bare the skull bone; on the right side of the head there was another wound, that fractured the skull and detached a small portion of the skull bone; that there was a puncture wound just above the right eye, which turned, after it reached the skull bone, without breaking it, in the direction of the ear, passing under another bone below the temple and extending down in the neck. The witness probed it to the depth of three or four inches; thought it a gunshot wound, though he did not find the ball or search for its termination. The witness was of opinion, that either this wound or the one upon the right side of the head would have produced death. The witness stated, that he was a practicing physician, possessing peculiar knowledge and skill upon the subject of wounds.

The State then called Mrs. Susan Tilghman upon this part of the case, who testified, that she was the widow of the deceased, and was at home on the fifteenth of August, when the deceased returned home with a wound upon each side of the head and one above the right eye; that he was bleeding when he came; that he said to the witness: "I shall leave you a widow before to-morrow morning;" that she and deceased then had some talk about the disposition of his property after his death, when they concluded it would be better to sell the land and keep the negroes; that she told the deceased, she thought, if the blood could be stopped, he would yet recover, when he told her to stop the blood; that she did stop the blood

and told him she thought he would recover and yet live longer than she would, and he replied, "*save me if you can.*"

This witness also stated, that she thought the deceased thought he would not die from the wound, but the court refused to consider the witness' opinion, as to what the deceased thought. This witness also said, the last words she heard the deceased say, were, "Save me, Wilson, if you can;" that the appeal was made to Wilson Tilghman, his brother, who was present. She further said that the deceased seemed addled like a drunken man; that he spoke very indistinctly, sometimes talking rationally and at other times foolishly.

The prisoner called Wilson Tilghman upon this part of the case, who testified, that he was brother to the deceased and father to the prisoner; that he was at the house of the deceased on the fifteenth of August last, just before his death; that he did not believe the deceased thought he would die; heard him say, "save me, Wilson, if you can."

This witness also stated, that the deceased seemed addled and spoke indistinctly, saying some things intelligibly and others foolishly.

The prisoner's counsel still objected to the admission of the declarations of the deceased, for the reason, that his request of the witnesses, to save him if they could, manifested hope on his part, that he would still recover, and a belief that it was possible for him to survive. And that, even though he had entertained the opinion at one time, that he would die from the effects of the wounds, yet he subsequently changed that opinion and entertained hopes of recovery; and that any declaration made, while laboring under the first impression, would not be admissible, in consequence of such subsequent change of opinion and hopes of recovery; and that the expression referred

to, "save me if you can," was evidence that the deceased had changed his opinion that he would die from the effects of the wounds, if he had before entertained such opinion; and that the declarations were inadmissible for the further reason, that the deceased was *non compos mentis* and insane at the time they were made.

The court concurred with the prisoner's counsel in the correctness of the legal positions assumed, but expressed the opinion, that the deceased did entertain the opinion that he would soon die from the effects of the wounds, and so expressed himself; and that it did not appear from the testimony, that he had subsequently changed that opinion; and that the exclamation, "save me if you can," rather manifested a desire to live, than a hope that he would recover; that the nature of the wounds was calculated to confirm the deceased in the opinion, that he would necessarily die from their effects in a short time; and that it did not appear from the evidence, that the deceased was insane in his last moments, but it did appear that he was rational and sensible of his situation.

The evidence proposed was therefore admitted.

The solicitor then continued the examination of the first witness, Wilson, who further testified, that, when he reached the house of the deceased, as set forth in the other part of his testimony, he found him bleeding and wounded, as described: that witness asked the deceased, if he knew who had given him the wounds, and he replied that he did: that the witness then asked who it was, and he said it was John Tilghman, the prisoner at the bar: that the witness also asked him, if he had been shot, to which he replied, "if he had been, he did not hear the report of the gun; that he heard something pop like a percussion cap:" that the witness did not remain to have further conversation, but proceeded to Kinston after a physician.

William Wingate was then called as a witness by the State, who testified, that he saw the deceased at his own house after he had received the wounds spoken of and just before his death: that he was at the time engaged in a conversation with Wilson Tilghman, the witness heretofore called; that Wilson Tilghman asked the deceased, how the affair took place, and the deceased attempted to tell him, but his lips and tongue seemed to be stiff, and he so muttered his words, that he could not be understood by the witness; whereupon Wilson Tilghman told the deceased, how John Tilghman, the prisoner, said it took place, to which deceased replied, "Not so, Wilson; John met me in the road and told me he had come on purpose to kill me." The witness said, he did not remember any of the statement of Wilson Tilghman, which brought forth this reply of the deceased.

The prisoner's counsel objected to the testimony, upon the ground, that the witness could not remember the substance of the statement of Wilson Tilghman, to which this negative of the deceased applied; and that it was but a part of the conversation. The court overruled the objection and admitted the evidence.

This witness further stated, that subsequently to this conversation, he heard the deceased exclaim, "he has killed me."

Upon cross-examination, this witness said, he saw the prisoner the same afternoon at Council Wooten's—he was lying down on the piazza and was bleeding; the blood had run through the bed and along the floor. He also saw the knife, exhibited in court, picked up the same day, after he saw the prisoner at Wooten's. It was found in the road spoken of by the witness Wilson. There was blood upon it at the time, and blood in the road at different points.

In reply to a question asked by the prisoner's counsel, this witness said, he had told one Garby, that we would

for one hundred and fifty dollars leave the country and not appear as a witness against the prisoner: that this was said in reply to an offer made to him by the said Garby, who told him, that Wilson Tilghman, the father of the prisoner, said he did not want his (Wingate's) oath to hang his son, and that he would give him one hundred dollars to leave the country and not appear as a witness.

Dr. Woodley was again called to the stand, and described the wounds of the deceased to the jury, as he had done to the court, when he was before examined, and gave the same opinion as to their effects. He also said, that he saw the prisoner soon after he saw the deceased and upon the same day; that he had a wound through the right hand near the thumb. It was made with a knife, which cut an artery and a nerve in passing through. Witness took up the artery some days after this time, and was compelled to take it up again at another place twelve days later. The knife entered on the inside of the hand and turned towards the brawn of the thumb. The prisoner would have died during the night had he not received medical aid.

Council Wooten was next called by the State, who testified, that he lived three or four hundred yards from the place in the road, where the wallet and blood were found as described by the witness Wilson: that he was at home on the fifteenth of August last in the afternoon, when he heard the report of the rifle gun proceeding from about the place where he afterwards saw the blood in the road: that in about five minutes or, perhaps, less after he heard the report of the gun, the prisoner at the bar came to his house with the rifle, exhibited in court; he came from the direction, in which witness had heard the gun fire; the rifle had blood upon it at the time, and the barrel was bent: that prisoner had blood upon him, and was then bleeding profusely from a cut through the right hand: the rifle was the one claimed by the prisoner before this time,

and which he usually carried. It was a percussion lock and required to be sprung before the hammer of the lock would fall. The barrel was not bent, when the witness last saw it before this time. The witness then sent for Wilson Tilghman, the father of the prisoner, who came to the house of the witness and proceeded with him, Wingate, and another to the place where the blood was found in the road. They saw the blood as described by the witness, Wilson, and found lying upon the ground the knife, exhibited in court. It had blood upon it, and is the same the witness saw the deceased have a short time before.

The solicitor next called Carrol Jackson for the State, who testified, that in the month of July last, he was at the house of the deceased, when a controversy arose between two little girls about a broach of cotton: that the prisoner interposed, with some remarks, when the deceased seemed to get angry with the prisoner and threatened to kill him. The prisoner told him not to do it sneakingly, but to go out with him and have a fair fight. The prisoner then took down his rifle, wiped it out and loaded it, and told the deceased to take his double barrel gun, and go out with him and take a fair fight with these weapons: to which the deceased replied that the prisoner might go where he pleased, but he, (the deceased) would not go with him. This witness also said, the deceased told him, the prisoner had been working at his house: that he saw the deceased's hat after the blows had been inflicted, and it had no hole in it.

The solicitor next introduced Mr. King; who said he saw the deceased on the morning after his death and that he had no marks of gunpowder about his face.

The prisoner then called as a witness one Cox, who said Joseph J. Tilghman died on Thursday, and on the Sunday before, the witness met him, when he said the prisoner had abused him in his own house and if he did

not mind he (the deceased) would kill him—that he had a great mind to kill him anyhow.

Mrs. Susan Tilghman, who had heretofore been introduced by the solicitor upon a question to the court, was now recalled by the prisoner, and cross-examined as to the facts of the case. She said, the prisoner and deceased had a quarrel in July last—it grew out of a controversy between two little girls about a broach of cotton: that the deceased then threatened to kill the prisoner, who told him not to do it sneakingly, but openly—to take his double barrel gun and he (the prisoner) would take his rifle and with these weapons they would have a fair fight: that the deceased replied, "he was not ready then:" the deceased then said he would kill the prisoner if he did not let him alone: that the prisoner then threatened to tell his grandfather, and the father of the deceased, about certain notes the deceased held against him; and said, "you know you got the land for nothing you bought from grandfather:" that the deceased had, previous to this time, informed the witness and prisoner, that he had taken up several notes from Mr. John C. Washington upon his father, and he merely acted as his agent in the matter: that he (the deceased) still held the notes uncancelled, and intended to hold them against his father, as though he had purchased them from Mr. Washington: that he also had another note made payable to his father and signed by the deceased, with the word "Paid," marked across its face: that this note was of the same date and for the same amount as one his father then held on him for the purchase money of a tract of land; and that when the note, held by his father, was presented for payment, he intended to offer this cancelled note to show, that the money for the land had been paid, it being the only debt of the kind he ever owed his father: that the five hundred dollar note in his possession was drawn to secure the purchase money of the land bought, but was not delivered, because in it

the word, "dollars," was spelt, "dolers;" and upon this being observed, that he (the deceased) executed another note for the land, and retained this.

The witness further said, that on the Sunday night before his death, she told the deceased she had heard the prisoner had told his grandfather about the notes and would make an affidavit of the facts, and she was afraid she would be called on to give evidence in the matter; to which the deceased replied, "he will have to swear soon if he does, for I intend to kill him before Saturday night." She also stated, that the prisoner and deceased had another quarrel just before his death, when deceased took down his gun, drew a load of small shot and reloaded it with large shot, and followed after the prisoner towards the woods: that he returned, and said he could not overtake the prisoner, and that if he had done so, he would have killed him: that, at another time, just before his death, the deceased hid his musket in his blacksmith shop, near his house, as he said, for the purpose of killing the prisoner; he said he did not want every person to see him carry his gun out. She also said, that the knife, exhibited in court and spoken of by the witnesses, was the knife of the deceased: that the prisoner was at the house of the deceased on the same day the deceased received his wounds, and they seemed then to be friendly.

This witness also stated, that she was present when the conversation took place between Wilson Tilghman and the deceased, and that she did not hear the language used by the deceased, as stated by Wingate.

Wilson Tilghman was next called by the defense. He said he was the father of the prisoner; that on the fifteenth day of August past, in the afternoon, he went the house of the witness Wooten, having been sent for by him: that he there found the prisoner, who had a fresh cut through the right hand which was bleeding profusely: that the prisoner had then lost much blood and seemed

to be greatly exhausted: that the witness then went to the place in the road referred to by the other witnesses: that they picked up the knife exhibited in court and it had blood upon it: that this place was about three hundred yards from Wooten's house, and that the intervening space was unobstructed, so that a child could be seen in Wooten's house door: that there was a scuffling place in the road between the wallet and puddle of blood, as marked by the road: that the witness walked from this place to the hog pen, spoken of by the witness, Wilson, in the space of two and a quarter minutes. This witness also said, he was at the house of the deceased the same afternoon just before his death: that he had a conversation with him, and did not hear him make the declarations deposed to by the witness Wingate: that this witness was there at the same time and during the entire time that Wingate was present. This witness also stated, that the deceased seemed addled like a drunken man—his speech was indistinct and thick—he muttered out his words and could not be distinctly understood in everything he attempted to say.

Several witnesses were then called by the State and defense as to the character of Wilson Tilghman, whose testimony it is deemed unnecessary to report.

The court, after reciting all the evidence offered in the case, charged the jury, that before they could convict the prisoner, they must be satisfied of the death of Joseph J. Tilghman: that he was killed by the prisoner, and that the act was done with malice aforethought either expressed or implied: that such malice did not mean simply ill-will or hatred; those passions might or might not characterize such malice as is charged in the bill of indictment, and which is necessary to constitute the crime of murder: that, if they entertained the opinion from the testimony, that the prisoner, with a previously formed design and fixed will, and an actual and deliberate intention to take away

the life of the deceased, did kill him, then he would be guilty of murder, for this would be a killing with express malice: that, if they believed the prisoner killed the deceased with a deadly weapon, then the fact implied malice from the very fact of killing, and he would be guilty of murder, unless the inference of malice was repelled by evidence offered by the prisoner, or circumstances arising out of the evidence produced against him, or both combined; for in such case the law would infer that he intended the natural consequences of his own act: that a rifle gun, such as described by the witnesses, is what is known in law as a deadly weapon, whether it be used by shooting a ball therefrom or by striking upon the head with either end of it. If the prisoner, having his rifle gun, sought the deceased with the design of provoking him into a fight, and when engaged in the affray of killing or doing him some great bodily harm, and under these circumstances did kill him, the prisoner would be guilty of murder.

Or if they should be of opinion, that the deceased gave to the prisoner a provocation by assaulting or striking him, and the prisoner retaliated with a weapon greatly more dangerous than the one used by the deceased, or with an excess of force, wholly inadequate to such provocation, then these were circumstances, from which they might infer a wicked, depraved and malignant spirit upon the part of the prisoner, amounting to malice, and by killing the deceased under such circumstances he would be guilty of murder. If the prisoner and deceased engaged in a mutual affray, and while so engaged, the prisoner killed him of passion, he would not be guilty of murder, but of manslaughter only, and this would be the case even though he killed him with his rifle or any other deadly weapon, for such would be a killing without malice; that if they believed the deceased made an assault upon the prisoner, that there was an actual necessity for the pris-

oner to kill the deceased in order to save his own life or prevent some great bodily harm to himself, and, under such circumstances, he killed the deceased, he would not be guilty of any offence, but excused in law; or even if there was an *apparent* necessity for him to kill the deceased in order to save his own life or to protect himself from some great bodily harm, he would not be guilty. And by *apparent* necessity it is meant, that if, from the character of the weapon used by the deceased and from the manner of his assault, a person of ordinary fears and ordinary apprehensions would be induced to believe it necessary to kill in order to prevent death or some great bodily harm, then by killing the deceased, under such circumstances, the prisoner would not be guilty of any offence, but would be excused in law.

Here the charge of the court closed; when the presiding judge turned to the defendant's counsel and asked if they desired any other instructions from the court to the jury. In reply to which, the defendant's counsel asked the court to charge the jury, that if they entertained a reasonable doubt of the prisoner's guilt, they ought to acquit him. Upon which the court informed the jury, that, before they could convict the prisoner, they should be satisfied beyond a reasonable doubt, that he killed the deceased; and that, if they should be satisfied beyond such doubt, that the prisoner killed the deceased and with a deadly weapon, then they ought to convict him, unless the prisoner convinced them by his own proofs or circumstances arising out of evidence offered by the State, that the killed in self defense, or that the killing was extenuated from murder to manslaughter; in which latter case they should find him guilty of manslaughter only; and if the killing thus appeared to be in self defense, they should return a verdict of not guilty.

The court again asked the prosecuting officer and coun-

sel for the prisoner, if they desired to ask further instructions to the jury; to which they replied, that they did not.

Whereupon the jury retired; and afterwards returned with a verdict, in which they found the prisoner guilty of murder.

The prisoner's counsel moved for and obtained a rule for a new trial:

1st. Because the court admitted improper testimony against the prisoner, after objection.

2nd. Because the court excluded proper testimony offered by the prisoner.

3rd. Because the court gave erroneous instructions to the jury.

4th. Because the court refused proper instructions prayed for.

5th. Because the court, in summing up, omitted to tell the jury, they ought to disregard the dying declarations of the deceased, if they thought him insane at the time he made them.

6th. Because there was a separation of the jury and other irregularities practiced by them, before they returned their verdict.

For these latter reasons the prisoner also contended that there was a mistrial and that he was entitled to a *venire de novo*. As to the alleged misconduct of the jury, while out and before their verdict was returned, many witnesses were examined, and the following facts appeared to the court as satisfactorily proved.

The jury was placed in charge of an officer and was confined in the ordinary jury room in the third story of the court house in the town of Newberne: That they retired from the court on Thursday of the term at six o'clock P. M. and rendered their verdict at 10 o'clock A. M. on the following Saturday. While out, the members of the jury separated at various times to obey calls of nature. Each one, so separated himself from the others

more than once for this purpose, and one of them did so as often as six times. When they did this, they went one at a time under charge of an officer, and, during such absence, the other jurors remained together in the jury room with the door locked. They went about fifty yards from the court house, and returned as soon as practicable, without holding intercourse with any one. And at one time one of the jurors went for the same purpose as far as one hundred and fifty yards from the other jurors. That one Elijah W. Ellis, a juror, separated himself from his fellows and visited a drug store at the distance of one hundred and fifty yards from the jury room. He was sick at the time and went to procure medicine, which he did, and returned without delay to the jury room. He went under the charge of an officer and held no conversation with any one except the keeper of the drug store, who asked him if they had agreed in their verdict, to which he replied, "*they had not.*" This drug store was in the most public place in the town of Newberne.

It also appeared, that one Dewey, a juror, separated himself from his fellows and stood on the outside of the jury room, near the door closed, and conversed for ten or fifteen minutes with one Richardson, privately.

The subject of conversation did not appear to the court.

The jurors also ate and drank while out, but not to excess. They did so with the permission of the court a part of the time, and when enjoined by the court not to eat or drink, they violated this injunction, contrary to the wishes of the officer, who had them in charge. Several jurors wrote notes and letters and dropped them from the windows of the room, in which they were confined. The contents and names of the persons to whom these letters were directed, did not appear to the court. It also appeared that several jurors received letters from persons not upon the jury. The contents did not appear to the court.

It farther appeared, that some of the jurors conversed from the windows of the jury room with persons in the street on various subjects and about this suit. What was said did not appear. It also appeared that negro servants and some small children of one of the jurors had access to the jury room. The servants entered for the purpose of carrying food and clothing to the jurors, and the children to see their father.

The court expressed its disapprobation of the irregularities of the jury, but being satisfied, that they were generally men of high character, and that no undue influence was brought to bear upon them, but that these irregularities were the re ults of their long and unpleasant confinement, overruled this and other causes assigned for a new trial, and discharged the rule.

The court, being further of opinion, that the separation and other irregularities of the jury did not vitiate the ver dict, pronounced judgment of death upon the prisoner.

From which judgment, the prisoner prayed an appeal to the Supreme Court, which was granted.

Attorney General, for the State.

J. W. Bryan, for the defendant, submitted the following argument:

In order to warrant the admission of dying or death bed declarations it must be shewn in the first place, that the declaration was made under an apprehension *of impending death;* and this seems to be the only instance in which such evidence is admissible against a prisoner, who has not had the power to cross-examine—an anomaly, which in itself calls for great caution and circumspection in the use and application of such evidence. To enable these testimonies to be given in evidence, they must be made when the party is not only in actual danger of death, but when he is aware of the cir-

cumstances in which he is placed and impressed with a sense of speedy dissolution. 1 Chitty Com. Law, 569; 1 Leach, 503; 1 East P. C., 353. But if at the time of making the declaration the party had reasonable prospects and hope of life, such declaration ought not to be received. *State* v. *Moody*, 2 Hay. R., 31. The case states that the wife of the deceased told the deceased, she thought if the blood could be stopped *he would recover yet*, when he told her to stop the blood—that she did stop the blood and told him, *she thought he would recover and yet live longer than she would*, and he replied "save me if you can." There is no evidence that any declaration, charging the prisoner with the commission of the act, was made by the deceased *before* this assurance was given him by his wife, that he would recover; on the contrary, all the declarations of the deceased to that effect were made *afterwards*. Such declarations are not admissible in evidence. *Rex* v. *Mosely*, 1 Moody Crim. Cases, 101; Ib. Eng. Crown Cases, 101. In *Rex* v. *Crockett*, 19 Eng. Com. L. R., 418, a person who was told by the surgeon, that she would never recover, said, that she "hoped he would do what he could for her for the sake of her family." He again told her that there was no chance of her recovery. Held that this shewed such a degree of hope in her mind, as to render a statement, she then made, inadmissible, as a declaration, *in articulo mortis*. And BOSANQUET, Justice, before whom the case was tried, declared "this will not do, I must strike the whole of this evidence out of my notes." In *Rex* v. *Haywood*, 25 Eng. C. L. R., 331; 6 Carr and Payne, 157, it is held that any hope of recovery, however slight, existing in the mind of the deceased, at the time of his making a declaration, will render it inadmissible as a declaration *in articulo mortis*. In *Rex* v *Fagent*, 7 Carr & Payne, 238; 32 Eng. C. L. R., 501, if a person, whose death is the subject of a charge of manslaughter, express an opinion that she shall not recover,

and make a declaration, and at a subsequent part of the same day, asks a person whether he thinks she will "rise again." Held that this shewed such a hope of recovery, as rendered the person's declaration inadmissible. 38 Eng. C. L. R., 168, 172. In Christie's Case, O. B., 1821, Carr Supp. C. L., 202, the deceased asked his surgeon if the wound was necessarily mortal, and on being told that a recovery was just possible, and that there had been an instance, where a person had recovered from such a wound, replied, "I am satisfied," and after this made a statement; it was held by ABBOTT, C. J., and PARK, J., to be inadmissible as a declaration *in articulo mortis*, since it did not appear that the deceased thought himself at the point of death; for being told that the wound was not necessarily mortal, he might still have had a hope of recovery. Roscoe's Crim. Ev., 26. The mere fact that a person receiving his mortal wound, was heard to cry out, "O my people," is not alone sufficient evidence of the expectation of immediate death to authorize the admission of his declarations. *Lewis* v. *State*, 9 S. and M., 115. The twice repeated expression by the deceased, of "save me if you can," was held rather to manifest *a desire* to live, than a *hope* that he would recover—this distinction between *desire and hope* adopted, and recognized by the learned Judge, as the ground and inference, for the admissibility of this testimony, would seem to be one without much, if any difference, and would be but an increase of the harshness of the rule making such declarations evidence and aggravate the anomaly of its character. Who is there that has not felt in *desire*, what the wise man said of *hope*, (which is not much different from it,) that it being deferred maketh the heart sick, and that, still proportionable to the greatness of the desire. Locke Hum. Understanding, b. 11, c. 21. *Hope* is the encouragement given to *desire*. Cogan on the Passions, c. 2, s. 3. And *desire* is that sensation excited in the mind, by the view, or by the con-

templation of any desirable good, which is not in our possession, which we are solicitous to obtain, and of which the attainment *appears at least possible.* Ib. P t. 1, c. 2, s. 3. The opinion too of the witness, as to the belief of the deceased that he would not die, was admissible. *McKee* v. *Nelson*, 7 Cow, 355; 1 Leach Cr. Law, 503; 1 East C. L., 359, 360, *Trelawny* v. *Coleman*, 2 Starkie R., 191.

2nd. Although, as a general rule, it is true, that it is the province of the judge and not the jury to determine whether the circumstances, under which the declarations were made, are admissible in evidence, yet the jury are to judge of them and of their weight, as of all other testimony, and ought so to have been instructed by the court. The court in this instance left nothing upon this part of the case to the jury, but determined both upon the admissibility and weight of the evidence, and the sanity of the deceased at the time the declarations were made. 1 Greenleaf on Ev., 207; *Rex* v. *Woodcock*, 2 Leach Cr. Cases, 563; Phil. & Am. on Ev., 303; *Vass*'s *Case* 3 Leigh R., 794; *Commonwealth* v. *Murray*, 2 Ashmead, 41; *Commonwealth* v. *Williams*, 2 Ashmead, 69; 1. U. S. Digest Evid., 694. See also the remarks of Mr. Evans, 2 Poth. on Oblig., 256, (294). App. No. 16, who thinks that the jury should be directed previous to considering the effect of the evidence to determine—1st. Whether the deceased was really in such circumstances, or used such expressions, from which the apprehension in question was inferred; 2nd. Whether the inference, deduced from such circumstances or expressions is correct; 3rd. Whether the deceased did make the declarations alleged against the accused; and 4th. Whether those declarations are to be admitted, as sincere and accurate. *Trant's case*, McNally's Ev., 385; *White* v. *White*, 4 Dev. R., 257; *Sneed* v. *Creath*, 1 Hawks R., 309.

3rd. This case discloses the facts that after the jury were charged and whilst they were deliberating upon their ver-

dict, they repeatedly separated from each other; one juror left the jury room and stood outside near the door, but with the door closed, and conversed for ten or fifteen minutes with a stranger; the jury ate and drank with the permission of the court a part of the time, and when enjoined by the court not to do so, violated this injunction, contrary to the wishes of the officer, who had them in charge; a correspondence by means of letters was had and kept up by and between the jurors and persons out of doors not members of the jury; conversations were also had and held from the windows of the jury room, with persons in the street, on various subjects and about this suit, and servants and children were admitted into the jury room.

After the evidence has been heard and the jury retire to consider of their verdict, the oath administered to the officer, who is sworn to keep them, is as follows: You shall swear that you shall keep this jury without meat, drink, fire or candles; you shall suffer none to speak to them, neither shall you speak to them yourself (not adding the words, touching any matter relative to this trial, as in 6 T. R., 530–1, *et supra*,) but only to ask them, whether they are agreed. So help you God. Dalt., c. 185; 2 Hale, 296; Dick, Sess., 223; Bac. Ab. Juries, G., 1 Chitty C. L., 632. Accordingly in Com. Dig., tit. Enquest F., it is laid down, that after the evidence given, the jury ought to continue together till they agree on their verdict, without eating, drinking, fire or candle, or speaking with any one, except the bailiff to know if they be agreed. Co. Litt., 227, B.; 3 Just., 29, pl. 13; 15 Hen. 7, 1, 2. If a great tempest happens, the jury may depart from the place, where they are to consider of their verdict. So if a sudden affray happens, or if the house be upon the point of falling. Vin. Ab., tit. Trial G.; 4 Cites Bro. Verdict pl., 19; 14 Hen. 7, 29; Per Rede, Davers & Tremaile Bro. Jurors, pl., 13 S. C. The same law seems to be of fire

upon the house. Ib. Vin. Ab. Trial (G. g 4.) So in Comyn's Dig., tit., Enquest F.; if the jury separate on account of a great tempest, they shall not be amerced. (Plowd., 13 b; 15 Hen. 7, 1 b. 14; Hen. 7, 30.) In 4 Blac. Com., 360, it is said that when the evidence on both sides is closed, and indeed when any evidence is given, the jury cannot be discharged unless in cases of evident necessity; (Co. Litt., 227; 3 Just., 110; Fost., 27; *Gould's case*, Hill, 1764) till they have given in their verdict, but are to consider of it, and deliver it in, with the same forms, as upon civil cases, only, they cannot, in a criminal case, which touches life or member, give a privy verdict. But the judges may adjourn, while the jury are withdrawn to confer, and return to receive the verdict in open court. In Bul., *ni. pri.* 308, it is said, an officer of the court ought always to be placed at the door of the box, where the jury sit, to prevent any one from having communication with them; and when they depart from the bar, they are to be attended by a bailiff sworn for that purpose. In the *King* v. *Wolf et al.*, 1 Chitty's Rep., 401, which was an *indictment for a conspiracy*, Cor. ABBOTT, C. J., the trial being unfinished the first day, Abbott informed the jury that they might retire at night to their families, but warned them not to have any communication with any person, touching or concerning the matter in issue. They retired accordingly, and the next morning they assembled again, and the case being concluded, on that day, they found the defendants guilty. The defendants and their attornies were ignorant of such separation and retirement, until after they had formed their verdict. On motion to set aside this verdict, the cases were fully gone into by four counsel for the defendants; and they cited Lord *Delawere's case*, 4 Harg. Lt. Tr., 232; 1 Jac. 2, A. D. 168, and Kelyn, 56, where it is said by all the judges (on a question whether the court could allow the jury to separate,) "the jury being once charged, can never be dis-

charged, till they have found their verdict; this is clear; and the reason for that is, for fear of corruption and tampering with the jury. An officer is sworn to keep the jury, without permitting them to separate, or any one to converse with them, for no man knows what may happen; for though the law requires honest men should be returned upon juries, and without a known objection, they are presumed to be *probi et legales homines;* yet they are weak men and perhaps may be wrought upon by undue influence." The judges were unanimous in refusing the rule and delivered their opinions *seriatim*, ABBOTT, C. J., saying, I am of opinion that in case of a *misdemeanor*, then dispersion does not vitiate the verdict. In the case of the *King* v. *Stone*, A. D. 1796, 6 T. R., 530, which was an indictment for high treason, the court having set on the first day of the trial, from nine o'clock in the morning till ten o'clock at night, without any intervention or refreshment, and the Attorney General stating that his evidence would occupy four hours more, and some of the jury being very much exhausted, and incapable, as they declared, of keeping up their attention much longer, the court adjourned till nine o'clock the next morning, Lord Kenyon observing that necessity justified what it compelled; and though it was left to modern times to bring forward cases of such extraordinary length, yet no rule could compel the court to continue their setting longer than their natural powers would enable them, to do the business of it. The jury retired to an adjoining tavern, where accommodations were prepared for them, and the bailiffs were sworn "well and truly to keep the jury, and neither to speak to them themselves, nor suffer any other person to speak to them, touching any matter relative to this trial." The entry of the adjournment was in the following form: Thursday next after, &c. Forasmuch as it appears to the court here, from the length of time, which has already been occupied by the trial of the issue joined upon this

indictment, and the further time which will be necessarily occupied by the same, that justice cannot be done, if this court proceed without intermission upon the said trial: It is ordered that the jury empanelled and sworn to try the said issue, have leave to withdraw from the bar of this court, being well and truly kept by six bailiffs, duly sworn not to permit any person to speak to them touching any matter relative to the trial of this issue, and that the same jury shall again come to the bar of this court, on the morrow, at nine o'clock in the forenoon. And it is further ordered that the prisoner be again brought, &c. In Bro. Ab., tit. Verd., 17, 24; Ed. 3, 24, the jury were sworn and committed to the care of the sheriff, and when the justices would have taken the verdict, certain persons deposed, that victuals and drink were brought to the jury, after their charge, and that they were suffered to go out, for which reasons the justices refused to take their verdict, because it was suspicious; and complaint was made of this to the King, by bill, which he indorsed to the justices of *Banco Regis*, to do right and reason, and the under-sheriff by his servant, confessed that he permitted them to go at large, and because this appeared of record, as his misdemeanor, and he was an officer, a capias was awarded against him; and because their going at large, and victuals and drink being carried to them was only a surmise, a *venire facias* was awarded against the jury and the trespassers, and between the parties, a *venire facias de novo* was awarded. Where there has been an improper separation during the trial, if the verdict is against the prisoner, he is entitled to the benefit of a presumption, that the irregularity has been prejudical to him; and the burthen of proof is upon the government to shew beyond a reasonable doubt, that the prisoner has suffered no injury, by reason of the separation. If the government fails in this, the verdict will be set aside. *State* v. *Rescott*, 7 N. Hamp., 287; where a

part of a jury in a capital case, which lasted several days, frequently separated themselves from their fellow jurors at night, for fifteen or twenty minutes at a time, without being under charge of an officer, it was held that this was such an irregularity as vitiated their verdict. And it is not necessary for the prisoner in such case, to prove that the jurors have been tampered with—it is sufficient if they might have been. *McLain* v. *State*, 10 Yerge., 241. In *McLean* v. *The State* it is held that in capital cases, the jury after being sworn, should not be permitted to separate, until they have rendered their verdict, and if permitted to separate, the judgment will be reversed. 8 Mis., 153.

In *Smith* v. *Thompson*, 1 Cowen R., 221: Where two jurors (after the jury retired to consider of the verdict) separated from their fellows, and were gone some hours, but returned, and joined in the verdict, the court refused to set aside the verdict, *there appearing to have been no probability of abuse.* In *Horton* v. *Horton*, 2 Cowen R., 589, the jury agreed on their verdict, while the court were at dinner, and without the consent, or knowledge of either party, dispersed, and obtained their own dinners and returned into court at the opening thereof, and upon a motion to set aside the verdict, it was *held that if the slightest suspicion had appeared* that the privilege which the jury had taken, had been abused to the injury of the party the verdict should be set aside, but none such was shown or was insinuated. In the *People* v. *Douglass*, 4 Cowens R., 26, a jury impanelled to try a prisoner, upon an indictment for murder, were allowed to leave the court-house, during the trial, under the charge of two constables; and having left the court-house, two of them separated from their fellows, went to their lodgings, a distance of thirty rods, ate cakes, took some of them on their return, and drank spirituous liquors, though not enough to affect them in the least, and one of them con-

versed on the subject of the trial; they returned, heard the trial through, and joined in a verdict of guilty. Held, that the verdict should be set aside, and a new trial granted. And although the mere separation of the jury contrary to the directions of the court will not of itself be a sufficient cause for setting aside the verdict, yet if there be the least suspicion of abuse, the verdict should be set aside; et vide *Jarnagan* v. *State*, 10 Yerger, 529. So when a juror, after the cause was committed to the jury, drank brandy, though in a trifling quantity and as he stated to cure the *diarrhea*, it was held that the verdict should be set aside. *Brant* v. *Fowler*, 7 Cowen R., 562. And in this case the court observed: "We cannot allow jurors thus of their own head, to drink spirituous liquor, while engaged in the course of a cause. We are satisfied, that there has been no mischief; but the rule is absolute, and does not meddle with consequences. Nor should exceptions be multiplied. We have set aside verdicts on error, for this cause, even where the parties consented that the jury should drink." So where the jury procured their separation, by pretending to the constable that they had agreed upon a sealed verdict, when in truth they had not; and conversations out of doors were afterwards carried on in the presence of some of them, relative to the suit, by persons not on the jury; and on assembling, they were sent out again, though this was objected to by the plaintiff; and then they returned with a verdict for the defendant; it was held that the verdict should be set aside. *Oliver* v. *Trustees of Springfield*, 5 Cowen R., 283. In *Beebee* v. *The People*, 5 Hill's R., 32, which was an indictment *for maliciously maiming a horse*, in the course of the trial the prosecutor having failed to procure the attendance of one Dutton, whose deposition had been taken before the committing magistrate, it was proposed by the prisoner's counsel to admit the deposition to be read in evidence, provided time were allowed him to obtain wit-

nesses, in order to shew Dutton's incompetency, for want of religious belief. This was agreed to by the prosecutor, and the trial was accordingly suspended for three days. In the meantime the jury were allowed to separate, having been previously admonished by the court, however, not to converse with any one in relation to the case. At the expiration of three days, the court and jury convened, and the trial proceeded. NELSON, C. J., in delivering the opinion of the court, remarks, "in respect of the delay of the trial and separation of the jury in the meantime, it is not for the prisoner to take advantage of the irregularity, if it be such, as the indulgence was granted on his application, and for his benefit. Still, if it had appeared that any of the jurymen, while thus separated, were tampered with, *had held improper conversation in respect to the complaint, or in any way misbehaved themselves*, or abused the indulgence of the court, we should feel it our duty to interfere and quash the proceedings. But I do not find the slightest imputation against them. For aught that appears, they observed strictly the admonition of the court 'to *hold no conversation during the interim* about the complaint." In the important case of the *Commonwealth* v. *John McCaul*, Virginia Cases, 271, the prisoner was indicted for *grand larceny*, and the trial continued four days; on each of which the court adjourned for about two hours, giving orders, that in the meantime, the jury should be kept together, in a room by themselves, where they were allowed refreshments. On their way to the jury room, at the second adjournment, one of the jurors having been unexpectedly sworn on the jury, separated from his fellows for about twenty minutes, to attend to some necessary business. His pretense was that he wished to dine at home; his departure was opposed by the sheriff, who admonished him not to do so, and took hold of his arm to prevent him. The juror stated that he believed the court at that time did not instruct the jury

to remain together; and he understood the design of the adjournment was with the view, that the jury might obtain some refreshment. He ate his dinner at his boarding house and returned. Several persons asked him if the trial of McCaul had ended, to which he answered in the negative, but he had (as he stated) no further conversations with any one on the subject of the trial; denied that he had been practised with and no abuse appeared. Another juryman was absent a few minutes, on a visit to a sick child, (this was the morning of the second day of the trial) with an officer, from whom he was separated about five minutes, on going in his chamber to see his child. Verdict of guilty. On moving to set aside this verdict, Mr. *Wirt*, for the prisoner, defied the Attorney General to produce a single case of life and death, in which a verdict was allowed to stand, after a separation of the jury. And Mr. *Nicholas*, the Attorney General, said that Mr. *Wirt* could not produce a single case from the English books, in which the separation of one juryman from his fellows was sufficient to set aside the verdict. A majority of the court were of opinion that actual tampering, or conversation on the subject of the trial with a juryman, was not necessary to set aside the verdict. And per NELSON, J., (who delivered the opinion of the court) "from the mode in which collusion and tampering is generally carried on, such circumstance is generally known to no person, except the one tampering, and the person tampered with, or the persons between whom a conversation may be held, which might influence the verdict. If you question either of these persons on the subject he must criminate, or declare himself innocent, and you lay before him an inducement not to give correct testimony. The old rule was that the jury on no occasion, should separate. I mentioned (though it was with difficulty that the rule has been at all relaxed) that it is relaxed only in cases of imperious, or perhaps of una-

voidable necessity. But by allowing that a jury may separate without necessity and that their virdict should stand, unless the party accused, who, in these cases is in the custody of law, can shew that the jury not only have separated, but that they, or a member of it, has also been tampered with, or held communication on the subject; this great barrier against oppression may gradually be sapped and undermined, and the bulwark cannot long remain. Such a precedent would be productive of evils incalculable, and too great for the court, by its decision, to allow a door to be opened for them. Every danger, and particularly in such a case as this, should he watched and opposed in the beginning. The court will preserve "with fear and jealousy," and will not expose the trial by jury in criminal cases to such risks of contamination, as arises from the affidavits in this case. If the court hath without necessity, suffered a juryman to go home without an officer (which it would never do) it would vitiate the verdict. There is as much danger from a juryman's separating, without the act of court, as if it had been done by such act. Although there might, and probably was, no tampering with any juryman in this case, yet in a free country, in deciding in a particular case, the decision is to be according to general principles as applied to that case; and more good will arise from preserving the sacred principle, involved in this case, than evil from granting a new trial, although in this individual instance, a verdict has probably been given by twelve men in fact, unbiased by the separation." And Chief Justice SHAW, in the case of the *Commonwealth* v. *Roby*, 12 Pickering R., 519, commenting upon this (McCaul's) case, remarks, that "it is manifest that by such separation, the jurors might be thus exposed," and in his review of the authorities upon this subject, concludes his very able opinion with the remark: "The result of the authorities is, that where there is any irregularity which may affect *the impartiality of the proceedings*, as when

meat and drink have been furnished by a party, or where the jury have been exposed to the effect of such influence, as where they have *improperly separated themselves*, or have had communications not authorized: then inasmuch as there can be no certainty, *that the verdict has not been improperly influenced*, the proper and appropriate mode of correction and relief is by *undoing*, what is thus improperly and may be *corruptly done*—or where the irregularity consists in doing that, which may disqualify the jurors for proper deliberation, and exercise of their reason and judgment, *as where ardent spirits are introduced;* there it would be proper to set aside the verdict, because no reliance can be placed on its purity and correctness." In *Carstapher's case*, 2 Hay. R., 238, which was an indictment *for perjury*, the judge retired for a few minutes, and two of the jurors also retired, without leave, and without an officer, and returned again. The jury found the prisoner guilty; and upon a motion to set the verdict aside, it was held per HALL, J., "If it shall appear upon the affidavit of the jurors, *that they did not speak with any person in their absence*, the verdict ought not to be set aside." And this afterwards appearing, the motion was not further pressed. It would seem that if the contrary had appeared, the learned judge would have deemed it sufficient cause, to set aside the verdict; and per GASTON, J., in *Miller's case*, 1 Dev. & Bat., 528, "I believe I may lay it down *as an universal rule*, that there is *no* instance in England, either in ancient or modern times, in which such a dispersion (of the jury) is permitted, on trial for a capital offence, and for that very reason it follows, that such a dispersion must yet be deemed unlawful;" and per WASHINGTON, J., in the *U. States* v. *Haskell & Francois*, 4 Wash., Cr. Ct. Rep., 402, during a trial for a capital offence, the jury, after the adjournment from day to day, *previous to the charge*, may take refreshments, *but not afterwards.* Whilst these decisions embrace the leading authorities, both in

this country and in England, they would seem not to be entirely in accordance with that of the *State* v. *Miller*, 1 Dev. & Bat., 500, in this Court. In that case it was assumed, that upon the coming into court of the jury, who had been permitted to retire in charge of an officer, upon the closing of the testimony and before the charge of the judge, only eleven of the body appeared, but in less than two minutes, the other juror, whose name was third upon the list, and who did not answer when called, returned into the court-house, and the court refusing to grant a new trial on account of this dispersion of the jury, the prisoner offered to prove, that while this juror was thus absent from the body of the jury, he went to a store at the distance of one hundred, or one hundred and twenty yards from the court-house, and in view of it, to get a drink of spirits; this evidence the court below refused to receive, and the jury having found the prisoner guilty, the judgment of death was pronounced upon the prisoner. The absent juror stated that when he separated himself from the jury, he was obliged to step aside to obey a call of nature, and it was in proof that the place to which he went was about seventy or eighty yards from the court-house, but was out of the way and retired. This Court, then constituted of RUFFIN, C. J., DANIEL and GASTON, Judges, differed essentially in opinion, but mainly upon the legal effect and operation of the separation of a jury in a capital case—the two former holding misconduct in a juror in a capital case, as a separation from his fellows, or eating or drinking without the permission of the court, before delivering their verdict, to be a reason for applying to the *discretion* of the judge in the court below for a *new trial*, and not to render the verdict a nullity, and a *venire de novo* proper—and the latter, that any unauthorized and unexplained separation of a juror from his fellows, in a capital case, *in law*, vitiates the verdict, and a *venire de novo* should be awarded. *Minor irregulari-*

ties are ground for a *new trial* addressed to the *discretion* of the judge, who presided at the trial. Whilst it is always with diffidence and distrust that counsel press upon the Judges a review of their opinions, it cannot but afford them pleasure, to have an opportunity critically to re-examine the grounds by which they "have come to judgment."

It is true, that *new trials* are within the discretion of the judge, but this discretion means, not the whim of a judge but a *legal discretion;* it is his duty *discernere per legem quid sit justum*, and there must be a *legal rule*, for the government of this discretion, otherwise *jus est vagum.* The discretion of a judge is said to be the law of tyrants; it is always unknown; it is different in different men; it is casual and depends upon constitution, temper and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly and passion, to which human nature is liable. The discretion, therefore, to give assurance of certainty and integrity in the administration of justice, must be a legal discretion, regulated by known and fixed rules and principles. And of this opinion was Lord Mansfield in *Crisp* v. *Eynon*, 1 Burr., 390, where he adopts this principle, and in support of his judgment cites the quaint case of *Wood* v. *Gunston*, Michaelmas, 1655, Banc. Sup. Style, 466, which was an action on the case for speaking slanderous words, and upon a verdict for the plaintiff, the defendant having moved for a new trial, GLYNN, Chief Justice, said: "It was in the discretion of the court, in some cases to grant a new trial, but this must be a *judicial discretion*, and not an *arbitrary discretion.* And it is frequent in our books for the court to take notice of the *miscarriages* of juries and grant new trials upon them. And it is for the people's benefit that it should be so: for a jury may sometimes, by indirect dealings, be moved to side with one party and not to be indifferent betwixt them, but it cannot be so intended of the court." And in the

same case Mr. Justice DENISON concurred, and said it would be difficult perhaps to fix an absolutely general rule about granting new trials, without making so many exceptions to it, as might rather tend to darken the matter than to explain it; but the granting a new trial, or refusing it, must depend upon the *legal discretion* of the court, guided by the nature and circumstances of the particular case, and directed with a view to the attainment of justice. Mr. Justice FOSTER also remarked, that the question "depending on a variety of circumstances, is matter of legal discretion." And it would seem that in this Court the same doctrine would be held. *State Bank* v. *Hunter*, 1 Dev., 100. If attaints and the doctrine of mistrials furnished in the earlier history of law the only method of redress, and they have been succeeded by the modern practice of granting new trials, as affording a readier, and easier, and more just method of redress, that fact of itself furnishes a conclusive reason, why, in criminal trials especially, the authority of granting a new trial should be kept and exercised, under positive rules of law, and not left under the patronage and uncertain discretion of its ministers. The writ of attaint lieth to inquire whether a jury of twelve men gave a false verdict. Finch, 484. And a jury may be attainted in two ways—1st, where they find contrary evidence; 2nd, where they find out of the *compass of the allegata*. But to attaint them for finding contrary to evidence, is not easy, because they may have evidence of their own connusance of the matter by them, or they may find upon distrust of the witnesses, or their own proper knowledge; but if they find upon evidence, that does not prove the *allegata*, there it is easy to subject them to an attaint, because it is manifest, that what is so found, is an evidence not corresponding to their issue; and this was the only curb they had over the jurors; for the judge being the best master of the *allegata*, if they did not follow his direction, touching the

proof, they were then liable to the danger of an attaint: and therefore since the judges from the difficulty of attainting the jury, have granted new trials, whereby jurors having been freed from the fear of *attaints*, *they have taken a great liberty in giving verdicts.* Gilb. H. C. B., 128. And even if the verdict be notoriously wrong and find the prisoner guilty, it could only be set aside by attaint of the *King*, but not at the suit of the *prisoner.* 2 Hal. P. C., 310.; 4 Bl. Com., 361. Formerly *the only* remedy for the reversal of a verdict unduly given, was by writ of *attaint*, which is at least as old as the institution of the grand assize by *Hen.* 2, in lieu of the *Norman* trial by battle, but this is now abolished by 6 Geo. 4, c. 50. A mistrial on the other hand, is an erroneous trial on account of some defect in the persons trying, as if the jury come from the wrong county; or because there was no issue formed, as if no plea be entered: or some other defect of jurisdiction. 3 Cro., 284; Hob., 5; 2 M. & S., 270. Both of these remedies would seem to be applicable to breaches of those positive rules, which *the law* has established, in order to establish a fair, unbiased and impartial trial. A *venire de novo* is as ancient as the law, when attaints were in use, and as the judgment in attaint was very severe and the punishment excessively hard, to avoid that severity, it was thought better to proceed in a milder way, and *new trials* were introduced. The more modern practice hath declared that the former must be for matters apparently on the record, and is *of right.* The latter may be for matter not appearing on the record, and is addressed to the discretion of the court. The former is matter of error, and must be noticed by the appellate court; the latter is *ordinarily* not matter of error, nor else, where examinable. In this case the conduct of the jury, as appears by the record, was a breach of those positive rules prescribed by the law, to secure a fair, unbiased and impartial trial, and the law therefore annuls and vacates

the verdict. And in *Miller's case*, 1 Dev. & Bat., 512, the Court declare that they do not contend, that there may not be flagrant cases of misconduct during the separation of the jury, which ought to annul their verdict. Every one sees and feels that there is something unusual and unprecedented in this proceeding—if not wrong. And as Mr. Justice BLACKSTONE remarks, "next to doing right, the great object in the administration of public justice, should be to give public satisfaction. If the *verdict* be liable to many objections and doubts in the opinion of his counsel, or even in the opinion of bystanders, no party would go away satisfied, unless he had a prospect of reviewing it. Such doubts would with him be decisive; he would arraign the determination as manifest, and abhor a tribunal which he imagined had done him an injury without a possibility of redress." 3 Blac. Com., 391.

Dying declarations are excluded in evidence in this state, by the provisions of the seventh section of the Bill of Rights. "In all criminal prosecutions, every man has a right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony." If therefore the dying man be regarded as a witness, or accuser, the admissibility of his declarations precludes the possibility on the part of the accused, of confronting the accuser and witness with other testimony. The relaxation of the ancient rule of law denying to prisoners the right to have witnesses sworn in their behalf, and allowing them that privilege, is but an assertion of this principle which is secured to the citizen not only by our Bill of Rights, but also by the sixth article of the Amendments to the Constitution of the United States, which declares that "in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him."

PEARSON, J. We have considered the several questions presented by the case as made up by his Honor, and have come to the conclusion that there is no error.

The first exeception is untenable. The condition of the deceased was such as to make his declarations, competent evidence, as "dying declarations." It is not necessary, that the person should be *in articulo mortis*, (the very act of dying;) it is sufficient if he be under the apprehension of impending dissolution; when all motive for concealment or falsehood is presumed to be absent, and the party is in a position as solemn, as if an oath had been administered. The evidence was competent. The degree of credit to which it was entitled, was a matter for the jury; it was liable to be impeached, like the testimony of a sworn witness; and the jury were at liberty to give it more or less weight, as from the conduct of the witness, and the attending circumstances, they might suppose him to be more or less *impressed* by the obligation of his oath or the solemnity of the condition in which he stood.

The second exception, because of the rejection of the opinion of the wife of the deceased, that "she thought, the deceased thought, he would not die from the wounds," is also untenable. A witness is allowed to give his opinion as to the sanity of one at the time he made his will; or as to the affection of a wife towards her husband, viz.: whether she loved him or not; because a witness may have acquired a knowledge of the fact, from a thousand little circumstances accruing at different times which it is not possible to communicate; but the matter to which our attention is now directed is not of that character. What the deceased thought of his condition, was to be judged of by the state of his wounds, and what he *then* and *there* said and did. These circumstances it was in the power of the witness to communicate to the court; and the judge did right, requiring her to do so, whereby he was enabled to form an opinion, instead of allowing the witness to from

one for him. Upon the third ground of exception, the prisoner has no right to complain. The judge, perhaps, entered more largely into the discussion of the law of homicide, than the facts of the case called for, but he confined himself to the announcement of well settled principles, except in one instance; there he erred in favor of the prisoner. In this, he held, that if the deceased at the time he first made his declaration, was in a condition to make the evidence competent, but afterwards got better for a short time, and *then* had hopes of recovery, this would make the prior declaration incompetent. This cannot be law. We presume his Honor was misled by a misapprehension of *Rex* v. *Faquet*, 32 E. C. L., 501, where it is said, that a subsequent hope may reflect back to the time of a prior declaration, so as to show that the deceased was not *in fact* in a condition to make his declarations competent. But this falls very far short of supporting the position, that, if, at the prior date the deceased was *in fact* in a condition to make his declarations competent, a hope of recovery at a subsequent time would make that incompetent which was before competent.

The fourth exception has been fully considered in treating of the third.

The fifth exception, for an omission to charge, cannot be entertained, because the point was not made during the trial, and at the close of the charge, the counsel on both sides expressly stated, they desired no further instructions to the jury.

The last ground of exception, because of the irregularity and misconduct of the jury, is the only one upon which we have had much difficulty. Perhaps it would have been well had his Honor in his discretion set aside the verdict and given a new trial, as a rebuke to the jury and an assertion of the principle that trials must not only be *fair, but above suspicion.* This, however, was a matter of discretion, which we have no right to reverse. Our

enquiry is, was the misconduct and irregularity such as to vitiate the verdict, to make it in law, null and void, and *no verdict*?

In the consideration of this question, we have had occasion to review *State* v. *Miller*, 1 Dev. & Bat., 500, and it seems to us, that the decisions of the Court and the distinction between a cause for a new trial, which is a matter of discretion, and cause for a *mistrial*, which is a matter of law, is fully sustained by authority and by reason. The eminent talent of Judge GASTON, in a long and laboured opinion, was exerted on the other side of the question. But his argument fails in this: he does not give due weight to the fact, that, according to the modern practice, the presiding judge, *in favorem vitat*, has a discretion to give the prisoner a new trial, when suspicion is put upon the conduct of the jury, and although evidently oppressed by the position, that if such irregularity works a *mistrial* so as to make no verdict, a prisoner acquitted may again be put on trial, he attempts to escape the conclusion by a denial of the truth of the position, which is not supported by authority or any sufficient reason.

We wish not to be understood, as disclaiming a right to grant a *venire de novo*, when it is made to appear on the record, that there has not been a fair trial; on the contrary, we assert that right whether it is to be exercised *for* or *against* the prisoner. We take this plain position: if the circumstances are such as merely to put suspicion on the verdict by showing, not that there *was*, but that there might have been undue influence brought to bear on the jury, because there was opportunity and a chance for it—it is a matter within the discretion of the presiding Judge. But if the fact be that undue influence was brought to bear on the jury, as if they were fed at the charge of the prosecutor or of the prisoner, or if they be solicited and advised how their verdict should be, or if they have other evidence than that which was offered on

the trial in all such cases, there has in contemplation of law been no trial; and this Court, as a matter of law, will direct a trial to be had, whether the former proceeding purports to have acquitted or convicted the prisoner.

In the argument, the prisoner's counsel assumed the position that dying declarations are excluded as evidence in our state, by the provision of the 7th sec. of the Bill of Rights: "In all criminal prosecutions, every man has a right to be informed of the accusation against him, and to confront the accusers and witnesses with other testimony." We do not feel the force of the argument. The witness who proved what the dying man said, may be confronted with "other testimony," and the case is exactly the same as that of a witness who proves that the prisoner executed a certain deed or wrote a certain letter, whereupon the deed or the letter is received as evidence against him. This section of the Bill of Rights was aimed at the old practice, by which prisoners were not allowed to have witnesses *sworn* on their behalf, and the testimony came altogether on the part of the crown. Our ancestors did not intend to deny the rule of evidence, as to dying declarations, but to assert that in criminal prosecutions, prisoners ought to be allowed to have witnesses in their behalf, sworn and examined.

There is no error.

PER CURIAM. Ordered to be certified accordingly.

THE STATE v. ATLAS JOWERS.

Insolence from a free person of color to a white man will excuse a battery in the same manner and to the same extent, as in the case of a slave.

Appeal from the Superior Court of Law of ANSON County, at the Fall Term, 1850, his Honor, Judge *Battle*, presiding.

The defendant, a white man, was indicted for an affray with Bob Douglass, a free black man. The evidence was, that the defendant and Bob got into a quarrel, when the defendant asked Bob, why he had reported at a certain place that he, the defendant, had told a lie, to which Bob replied, because he had told one. Upon this the defendant struck Bob, and a fight ensued, in the course of which, Bob struck the defendant with the butt end of a wagon whip, and the latter knocked him down with the broken limb of a tree. The defendant's counsel contended, that the insulting language, used by the free negro, justified the blow which the defendant gave him, and that he afterwards used no more violence than was necessary to protect him in the fight.

The presiding judge charged, that, though the courts have held, that insulting language, used by a slave, may justify a white man in striking him, yet the principle did not apply to the case of a free negro, stricken under similar circumstances, by a white man.

The defendant was convicted, and, judgment being pronounced against him, appealed.

Attorney General, for the state.
No counsel for the defendant.

PEARSON, J. It is settled, that insolent language from a slave is equivalent to a blow by a white man, in its legal effect, as an excuse for a battery. If a blow is given by a white man, a return of it is excusable in self defense, to prevent a repetition of the injury; so, if a slave gives insolent language, a blow is excusable in self defense, being necessary to put a stop to his insolence.

The question presented to this case is, does the principle apply to free negroes? His Honor was of opinion that it did not. In this a majority of this Court believe there is error.

The same reasons, by which a blow from a white man upon a slave, is excusable on account of insolent language, apply to the case of a free negro, who is insolent. It is a maxim of the common law, where there is the same reason there is the same law.

But it is suggested, that free negroes differ from slaves in this, they have a right to own property, and to make contracts, which necessarily must frequently give rise to a difference of opinion, and if a free negro disputes the accounts of a white man, it is insolence, and will excuse a battery.

It is unfortunate, that *this third class* exists in our society. All we can do is to make it accommodate itself to the permanent rights of free white men. What amounts to insolence is a question for the court, and is the subject of review in the Court of supreme jurisdiction; this is some protection. But as compared with a slave how stands the case? If a slave is insolent, he may be whipped by his master, or by order of a justice of the peace; but a free negro has no master to correct him, a

justice of the peace cannot have him punished for insolence, it is not an indictable offence, and unless a white man, to whom insolence is given, has a right to put a stop to it, in an extra-judicial way, there is no remedy for it. This would be insufferable. Hence we infer from the principles of the common law, that this extra-judicial remedy is excusable, provided the words or acts of a free negro be in law insolent. Such a being as a slave or a free negro, did not exist when the ancient common law was in force. But the excellence of that "perfection of reason" consists in the fact, that it is flexible and its principles expand, so as to accommodate it to any new exigence or condition of society, like the bark of a tree, which opens and enlarges itself, according to the growth thereof, always maintaining its own uniformity and consistency.

PER CURIAM. Judgment reversed and a *venire de novo*.

COLUMBUS MILLS v. P. B. WILLIAMS.

The legislature has the constitutional power to repeal an act establishing a county. It has the same power to consolidate, as to divide, counties, the exercise of the power in both cases being upon considerations of public expediency.

The purpose of making all corporations is the *public good*. The only substantial difference between corporations is, that, in some cases, they are erected by the *mere will* of the legislature, there being *no other party interested or concerned*, and these are subject at all times to be modified, changed or annulled.

Other corporations are the result of contract; the legislature, for the purpose of accomplishing a public good, chooses to do it by the instrumentality of a *second party*. These two parties make a *contract;* the legislature, in consideration of certain labor and outlay of money, conferring upon the party of the second part, the privilege of being a corporation, with certain powers and capacities. Being a *contract*, it cannot be modified, changed or annulled without the consent of both parties.

Counties, &c., belong to the first class; railroad and turnpike companies, &c., are instances of the second class.

Appeal from the Superior Court of Law of RUTHERFORD County, at the Spring Term, 1849, his Honor, Judge *Bailey*, presiding, to the Supreme Court at Morganton, and thence transferred, by an order of that Court, to the Supreme Court at Raleigh.

This was an action of trespass, *vi et armis*, for an assault and battery on the plaintiff's person, tried at Rutherford spring term, 1849, upon the following facts, submitted to the court for judgment, as a case agreed.

The general assembly, at its session of 1846 and '47, passed an act establishing a county by the name of Polk,

out of certain portions of the counties of Rutherford and Henderson. By virtue of that act and a supplemental act, passed at the same session, courts, both county and superior, were organized, and all county officers were appointed and elected, and entered upon the discharge of their duties as such.

The site for the county town and court house was selected, and a deed to the chairman of the county court was duly executed and delivered. At the general election for sheriff, in August, 1848, the defendant was duly elected sheriff of Polk county, for two years, next ensuing—entered into bond according to law, and was qualified as such and acted as sheriff of said county, and claimed the right to act as such, at the time of executing the writ, under which the arrest was made, which issued from the superior court of Rutherford, with the county seal attached, attached, tested of the fall terme, 1848, and was directed to the sheriff of Polk county. The writ was issued on the 1st day of April, 1849, came to the defendant's hands on the 2nd day of that month, and it was immediately executed by arresting the plaintiff.

The said act of assembly was repealed at the session of 1848.

It is further agreed that a majority of the people of Polk county were opposed to the passage of the repealing act.

On the above statement of facts it is contended by the plaintiff, that the defendant, being no longer sheriff of Polk county, after the act went into operation which repealed the act establishing it, his arrest was not authorized, and, therefore, a trespass. On the other hand it is contended by the defendant, that the repealing act was unconstitutional and void, and therefore he was sheriff of Polk county, at the time of arresting the plaintiff, and well justified therein by virtue of the writ aforesaid.

And it was further agreed, that, if the repealing act be constitutional, there is to be judgment for the plaintiff for six pence and costs of suit; if otherwise, then the plaintiff is to have judgment of nonsuit. And his Honor being of opinion that the repealing act was constitutional, gave judgment against the defendant, accordingly, for six pence and costs, from which the defendant prays an appeal to the Supreme Court, which is granted.

B. F. Moore, for the plaintiff.

N. W. Woodfin and *Bynum*, for the defendant.

PEARSON, J. In 1846, the legislature established a county by the name of "Polk." In pursuance thereof justices of the peace were appointed, courts organized, and a sheriff and other county officers elected, who entered upon the discharge of the duties of their respective offices. In 1848 the act of 1846 was repealed, and the question is presented, has the legislature a right, under the Constitution, to repeal an act, by which a county is established?

From the formation of our state government, the general assembly has, from time to time, changed the limits of counties, and has, over and over again, made two counties out of one, so that, in many instances, even the name of the old county has been lost; and it would seem to an unsophisticated mind, that, where there is the power to make two out of one, there must be the corresponding power to make one out of two. In other words, as the legislature has, undoubtedly, the power to divide counties, where they are too large, that there is the same power to unite them, when they are too small: The power in both cases being derived from the fact, that by the Constitution "all legislative power is vested in the general assembly," which necessarily embraces the right to divide the state into counties of convenient size, for the

good government of the whole. Political and other collateral considerations are apt to connect themselves with the subject of corporations, and thereby give to it more importance than it deserves as a *dry question of law;* and the unusual amount of labor and learning, bestowed on it, has tended to mystify rather than elucidate the subject. Divested of this mystery, and measured in its naked proportions, a corporation is an artificial body, possessing such powers, and having such capacities, as may be given to it by its maker. The purpose in making all corporations, is the accomplishment of some *public good.* Hence, the division into public and private has a tendency to confuse and lead to error in the investigation; for, unless the public are to be benefited, it is no more lawful to confer "exclusive rights and privileges" upon an artificial body, than upon a private citizen.

The substantial distinction is this: some corporations are treated by the *mere will* of the legislature, there being *no other party interested or concerned.* To this body a portion of the power of the legistature is delegated to be exercised for the public good, and subject at all times to be modified, changed, or annulled.

Other corporations are the result of contract. The legislature is not the only party interested; for, although it has a public purpose to be accomplished, it chooses to do it by the instrumentality of a *second party.* These two parties make a *contract.* The legislature, for and in consideration of certain labor and outlay of money, confers upon the party of the second part the privilege of being a corporation, with certain powers and capacities. The expectation of benefit to the public is the moving consideration on one side; that of expected remuneration for the outlay is the consideration on the other. *It is a contract;* and, therefore, cannot be modified, changed, or annulled without the consent of both parties.

So, corporations are either such as are independent of all contract, or such as are the fruit and direct result of a contract.

The division of the state into counties is an instance of the former. There is no contract—no *second party*, but the sovereign, for the better government and management of the whole, chooses to make the division in the same way, that a farmer divides his plantation off into fields and makes cross fences, where he chooses. The sovereign has the same right to change the limits of counties, and to make them smaller or larger by putting two into one, or one into two, as the farmer has to change his fields; because it is an affair of his own, and there is no *second* party, having a direct interest.

A railroad is an instance of the latter—certain individuals propose to advance capital, and make a road by which it is supposed the public are to be benefited, in consideration that the legislature will incorporate them into a company with certain privileges. The bargain is struck: neither party has a right to modify, change, annul, or *repeal* the charter without the consent of the other; and, (still to borrow an illustration from the farmer,) he has in this case *leased* out his field at a *certain rent*, and has no right to make one larger and another smaller, without the consent of his tenant.

Roads furnish another familiar illustration. The county court has a public road laid out, and an overseer and hands appointed. It may be altered or discontinued by the county authorities, and the overseer and hands have no direct interest or right to be heard in the matter, except as other citizens. But, if the legislature, instead of acting by its agent, the county authorities, choose to make a contract with certain individuals, that, if they will raise funds and make a road, they shall be incorporated with the right to exact tolls, &c., then the road can-

not be altered or discontinued without the consent of the corporation.

When a county is established, it is done at the mere will of the legislature, because, in its opinion, the public good will be thereby promoted. There is no *second party directly* interested or concerned. There is no contract, for no consideration moves from any one, and without a consideration, there cannot be a contract. The dischage for certain duties by the persons, who are appointed justices of the peace, or sheriff, clerk, or constable, can, in no sense of the word, be looked upon as a consideration for establishing the county. In legal parlance, the "consideration is past"—the thing is done, before their appointment. Some act for the honor of the station; others for the fees and perquisites of office, but their so doing did not form a consideration for the erection of the county, and is a mere incident to their relation as citizens of the county.

It was ingeniously argued, that, upon the erection of a county, certain rights attach by force of the Constitution, as the right to have at least one member in the house of commons; and as these rights are conferred by the Constitution, it is insisted, that, having attached, it is not in the power of the legislature to take them away.

The argument is based upon a fallacy. It is true, the Constitution invests every county with certain rights, as incident to its existence as a county. But, by no sound reasoning, can the incident be made to over-ride the principal; and the Constitution, by conferring these incidental rights, cannot be, by any fair inference, made to interfere with the control of the legislature on the subject of counties, as instruments for the good government and management of the whole state.

The Constitution preordains these rights, but they are put expressly as incidents to the existence of counties; and although they may very properly enter into the ques-

tion of expediency, they have no legislative bearing upon the power to create and abolish counties, as may to the wisdom of the legislature seem fit. Such statutes are not the result of contracts. There is no second party, who pays a consideration, which is the essence of every contract. *Terrett* v. *Taylor*, 9 Cranch, 43; *Darmouth College* v. *Woodward*, 4 Wheaton, 663; *Phillips* v. *Bury*, 2 T. R., 346.

PER CURIAM. Judgment affirmed.

FLETCHER ORMOND v. WYATT MOYE.

Where one is summoned as garnishee in an attachment, who owes a note which is negotiable; if he chooses to stand upon his rights, no judgment can be taken against him, without proof that the absconding debtor still holds the note, or had not assigned it, by endorsement before it was due, for, otherwise, it does not appear that he is indebted to the absconding debtor.

However it may be, as to notes payable *on demand*, whether or not they are considered over-due until demand made; it is certain that a note, payable "at sight" or "when presented," is not due until it is presented.

The case of *Myers* v. *Beeman*, 9 Ire., 118, cited and approved.

Appeal from the Superior Court of Law of GREENE County, at the Fall Term, 1850, his Honor, Judge *Ellis*, presiding.

This was an action of debt. The plaintiff declared, as the indorsee of a promissory bond, of which the following is a copy: "$160. I promise to pay Benjamin C. D.

Eason or order, at any time after ten days from this date, when presented, one hundred and sixty dollars, value of him received. April 24th, 1848." Signed, "Wyatt Moye," and sealed: Indorsed, "I transfer the within note to F. Ormond for being value received, May 29th, 1848." It was admitted that the indorsement should, in fact, have been dated on the 29th of June, 1848. The defendant pleaded that there was no indorsement, and, specially, that he was summoned as garnishee by the sheriff of Edgecombe county, on the 1st day of May, 1848, to appear before the justices of the county court of Edgecombe on the 4th Monday of May, 1848, in a suit of attachment at the instance of Joshua Speight against B. C. D. Eason, and that on the said 4th Monday of May he filed his answer in the said cause, and pleads the proceedings in the said suit by attachment, the judgment therein and his satisfaction of the same. The defendant produced a copy of the record in the attachment suit, referred to in his plea, from which it appeared that the defendant stated in his garnishment, that on the 24th of May, 1848, he executed his note to the said Eason for one hundred and sixty dollars payable ten days after date—that he knows nothing of the said note since it was executed—that the said Eason left his residence on the same day, as is reported and believed, and went out of the state, and has not since returned—that, knowing from the negotiable character of the said note, a good and unquestionable title to the same may be procured by indorsement, and that, if the same has been transferred before it became due, he may be compelled to pay the said note to the holder, when presented, he prays the court for protection against such liability of double responsibility. It appeared further from the said transcript, that, upon this garnishment, judgment was subsequently rendered against Moye for the amount of the said note and interest; and it appeared by other evidence, that the judgment had been satisfied.

The defendant contended, and prayed the court to instruct the jury:

1st. That, if they believed the testimony, the plea of the defendant was sustained, and the plaintiff could not recover on the issue.

2nd. That the bond declared on was over-due and dishonored, at the time of its transfer to the plaintiff on the 29th of June, 1848, and that it was subject, in the hands of the plaintiff, to all the defenses, which would have been good against the payee; that the proceedings under the attachment of Speight operated to give to Speight a lien upon the sum, owing by the defendant upon the bond, either from the time of the service of the summons on the defendant, on the 1st of May, 1848, or from the time of the defendant's answer as garnishee on the 4th Monday of May, 1848; that, after that period, Eason could not transfer the bond, so as to give his transferee any better title than he had himself; and that the proceedings under the attachment would have been a defense to a suit by Eason, and were a defense to the suit of the plaintiff.

3rd That, if any demand was necessary, after the expiration of ten days from the date of the bond declared on, in order that the bond, remaining unpaid, should be considered dishonored, the law would or the jury might, infer a demand and refusal prior to the time of the indorsement, to-wit, the 29th of June, 1848; and that the suing out of the attachment on the 27th of April, 1848, and the notice to the defendant, as garnishee, on the 1st of May, 1848, were equivalent in law to a demand and refusal.

4th. That the transfer to the plaintiff was not an indorsement and did not give him a legal title, so as to enable him to sue, as indorsee, in his own name.

The court instructed the jury, that there was no evidence of a demand on the bond declared on, before the 29th of June, 1848, and that it was not over-due or dishonored, when transferred to the plaintiff on that day;

that the transfer to the plaintiff was a valid indorsement, and gave him the legal title of an indorsee; that, inasmuch as the bond was not due at the time of its indorsement, and the plaintiff was a *bona fide* indorsee, the proceedings under the attachment created no lien, and, if they believed the testimony, the plaintiff was entitled to a verdict in his favor.

The jury found a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

J. H. Bryan, for the plaintiff.

Rodman, for the defendant.

PEARSON, J. There is no error. The defendant upon his garnishment ought to have denied the fact of his indebtedness to Eason, unless it was first proved that Eason had not assigned the note before its maturity. It was his folly to submit to a judgment, by which the amount of the note was condemned in his hands, to the payment of the debt of the creditor in the attachment. This subject is fully explained in *Myers* v. *Beeman*, 9 Ire., 116, where one is summoned as garnishee, who owes a note which is *negotiable;* if he chooses to stand upon his rights, no judgment can be taken against him, without proof that the absconding debtor still holds the note, or had not assigned it, by indorsement before it was due; for otherwise it does not appear that he is indebted to the absconding debtor.

Assuming, that, as against the payee Eason, the satisfaction of the judgment upon the garnishment is sufficient, without its being done *on execution*, (which is required by the old cases,) the plaintiff, in this case, asserts and is entitled to, all the rights of an indorsee *before maturity:* if so, the note passed to him, subject only to *indorsed payments.*

There is some difference in the books upon this question of a note payable *on demand*, whether it is due presently, and therefore cannot be assigned, except as a note over-due, until demand is formally made; but it is conceded in all the cases, that a note payable "at sight," or "when presented," is not due until it is presented, and so the note in question was transferred to the plaintiff before its maturity. In fact the defendant, in his garnishment alleges the fact, that the note had never been presented for payment, and in his amended answer admits expressly, that the indorsement was made before the note had been presented, and of course before it was dishonored.

PER CURIAM. Judgment affirmed.

DOE ON DEMISE OF WILLIAM MOORE v. MILLICENT EASON.

Parol evidence may be admitted to show a custom or usage of a place, where a contract is entered into, for the purpose of annexing incidents to, and explaining the meaning, of terms used in it. But before the incident can be annexed, the contract itself, as made, must be proved. The incident cannot be used to establish the contract, nor can it be inconsistent with the terms of the contract.

Appeal from the Superier Court of Law of PITT County, at the Fall Term, 1849, his Honor, Judge *Battle*, presiding.

Rodman, for the plaintiff,

No counsel for the defendant.

NASH, J. This action in ejectment is to recover from the defendant a house and lot in the town of Greenville, in the county of Pitt. The demise is laid on the first of January, 1849. The plaintiff claims, that the defendant entered into possession of the premises in 1848 as his tenant, and produced evidence tending to prove the fact to be so. In order to shew, that the tenancy had expired at the date of the demise, set forth in the declaration, he offered to prove, that it was the general usage in the town of Greenville for all leases to expire on the day next before the 1st of each January. This evidence was objected to, but was admitted by the court. There was a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

The only question now presented is, as to the admissibility of this testimony, under the circumstances, under which it was offered. We must take the case as it is sent to us. There cannot be a doubt, that parol evidence may be admitted to show a custom or usage of a place where a contract is entered into, for the purpose of annexing incidents to and explaining the meaning of terms used in it. The leading case on the subject is that of *Hutton* v. *Warren*, 1 Mason and Welbsly, 466. In that case it was decided, that the plaintiff was at liberty to show a custom, by which a tenant, cultivating the premises, according to the course of good husbandry, was entitled on quitting to receive a reasonable allowance for seed and labor bestowed on the arable land in the last year of his tenancy, &c. The custom, however, is admissible in proof, not for the purpose of establishing the contract, but to add an *incident* not expressly embraced in it, and in reference to which the parties are presumed to have contracted. Thus, if the lease in this case was made on the 1st of February, 1849, or from the 1st of January, 1849, for and during that year,

the plaintiff would be permitted to show, that by the usage or custom of Greenville, all leases made within the town and so terminating, expired on the day preceding the 1st of January. In that case the custom would transport into the contract an incident, upon which it was silent, but with respect to which the parties must be presumed to have contracted. But before the incident can be so engrafted, the contract, as made, must be proved—the incident cannot be used to establish the contract. The expiration of a lease, is as much a matter of contract as its commencement; nor can the incident be inconsistent with the terms of this contract. In the case of *Wigglesworth* v. *Dollison*, Douglas, 201, it was decided, that a custom, that a tenant, whether by parol or deed, shall have the way-going crop after the expiration of his term, is good, if not repugnant to the lease, by which he holds. See 1st Smith's leading cases, 300, where the case of Dollison is also reported, and the notes. The contract of lease in this case may have been for one month, two months, or six months, and whether the custom was applicable or not, would depend upon the term agreed for.

We think the testimony under the circumstances of this case was improperly admitted, and there must be a *venire de novo.*

PER CURIAM. Judgment reversed and *venire de novo* awarded.

THE STATE v. JOHN SMALL.

If the weather is so bad, as to prevent an overseer of a road from working on the road, or to render unavailing any work he might do, he ought to be excused.

Appeal from the Superior Court of Law of PASQUOTANK County, at the Fall Term, 1850, his Honor, Judge *Caldwell*, presiding.

Attorney General, for the state.
No counsel for the defendant.

NASH, J. The defendant is indicted, as an overseer of the road, set out in the indictment. It was not denied, that the road was out of order and not in such repair as the law required. The defense was, that, during the time specified, the weather was such, that it could not be worked. It was shewn, that, during the winter of '49, '50, and up to the finding of the indictment, the defendant had worked the road five days, and that up to April the weather was very wet, but that the latter month was fair. The bill was found at the spring term, 1850, of Pasquotank superior court, which commenced on the 22nd of April. The court was requested to instruct the jury, that the defendant ought not to be convicted, because of the state of the weather, and if he had used due diligence. This was declined, but the jury were instructed, that where the law imposed a duty and its execution was prevented by the act of God, the party was excused. If, in this case, the weather was so bad as to prevent the

defendant from working on the road, or rendered unavailing any work he might have done, he ought not to be convicted. But, if they believed the witnesses, who testified to the state of the weather in the month of April, and of the road during that month, they ought to convict him. The jury found a verdict against the defendant, and from the judgment thereon he appealed.

We see nothing in the charge that is erroneous. Whether the facts testified to by the witnesses were true, was a proper enquiry for the jury—whether, if true, the defendant was excused or not, was a question for the court. And we concur in the opinion expressed. We have looked through the record and see no error, or sufficient cause to arrest the judgment.

PER CURIAM. Judgment affirmed.

THOMAS C. SMITH v. DANIEL CAMERON.

An overseer is not strictly a bailee, though many of the principles of that relation and many of its duties attach to him. It is his duty to take such care of the property entrusted to him, as a man of ordinary prudence would take of his own property.

Appeal from the Superior Court of Law of BLADEN County, at a Special Term in December, 1850, his Honor, Judge *Dick*, presiding.

W. H. Haywood, for the plaintiff.

Strange, *W. Winslow*, and *D. Reid*, for the defendant.

NASH, J. The action is in case, brought to recover from the defendant, who was the plaintiff's overseer, damages for the loss of a negro man, by the name of Israel, upon the allegation, that the defendant negligently and wrongfully employed the negro upon business, not belonging to the plaintiff's concerns, which was dangerous in its nature, and whereby Israel lost his life. The plaintiff owned three fields on the Cape Fear River—two on the west side and one on the east. The defendant was his overseer, and Israel a hand under him. The lower field on the west side of the river was called "Pemberton," below which the defendant and the negroes lived; and the upper field was called "The Point," and lay opposite the field on the east side. On the day before the accident occurred, the defendant, with Israel and other hands, was employed in floating logs out of the field on the east side of the river into the current, that by it they might be carried off, there being at the time a very large freshet in the river, spreading over the low grounds and cultivated fields. Late in the evening, the defendant went down the river in a boat with Israel, stopped a while at a raft belonging to a man named Nardin, and then proceeded down the river to where he and the slave resided. The next morning the defendant came up the river in his canoe with Israel, and, after a short stoppage at Nardin's raft, proceeded on his way to his business in floating off logs. Nardin went with them to where their business lay, and after working nearly all day, the defendant, still attended by Israel, came down to a raft belonging to a man named Cameron, where he got out of the boat, and directed Israel to carry Nardin, who was with him, to his own raft and then return for him. When Israel left Nardin's raft, he crossed directly over to the other side of the river, where the boat got entangled among the bushes, was upset, and Israel was drowned. Israel was about forty years of age, a stout, active man, a good waterman, and

understood the management of boats and canoes, and was acquainted with the river. This was proved by a witness for the plaintiff, who further stated, that he did not consider that there was any danger, in the main current of the river, to boats or canoes. After Israel was drowned, the other hands, who had been employed in floating off the logs, came down the river in the course that the defendant had pursued in coming down. The case further states, that the usual course and the safest in getting from the dwelling of the defendant to the field on the east side, when a fresh was in the river, was through the low grounds of the Pemberton and Point fields to a spot opposite to the field on the east side. The case does not tell us distinctly on which side of the river the raft of Nardin was moored. We presume, however, that it was on the west side, as it is stated to have been a little above where the defendant lived.

The counsel for the plaintiff moved the court to charge the jury, that the defendant had been guilty of gross negligence, which made him liable to the plaintiff's recovery. This was declined; and the jury were instructed, that it was the duty of the defendant to take the same care of the plaintiff's property under his control, that a man of ordinary prudence takes of his own; and, if they believed he had not taken such care, or that he had not taken care, or that he had placed the slave in a dangerous situation, not in his owner's business and employment, and the loss of the slave was from want of proper care or from unnecessary exposure to danger, it was gross negligence and the plaintiff was entitled to recover.

The jury found a verdict for the defendant and the plaintiff appealed.

We can see in the instructions given no error, of which the plaintiff has a right to complain. In the argument, the case was treated as one of strict bailment, and the instruction asked for placed it upon that ground. An

overseer is not strictly a bailee, though many of the principles of that relation and many of its duties attach to him. It is his duty to take such care of the property entrusted to him, as a man of ordinary prudence would take of his own property. The court could not give the instruction asked for—the case discloses no such gross negligence. The court then instructed the jury what would amount to gross negligence. Was there error in this charge? We repeat, none, of which the plaintiff has a right to complain. The defendant, after spending as much time floating off logs from the field on the east side of the river, as he thought was prudent and safe, left on his way to his residence on the opposite side of the river. He was obliged to cross the river to effect his purpose. Pursuing his ordinary course, he stopped at a neighbor's raft, and directed Israel to put Nardin on his raft about two hundred yards below and then return for him. That he was in his ordinary course in returning home, is shown by his pursuing the same course the night before, and from the fact that the other negroes in their boats followed in the same direction. Israel was not a boy, ignorant of boating, nor a feeble man, but hale and strong, living upon the river, skilful in boating and accustomed to managing boats and canoes, and the witness of the plaintiff stated, there was no danger in the body of the stream. To return from Nardin's raft to Cameron's did not require the negro to cross the river, both rafts being on the same side, and, where he left, about a hundred yards apart. Why he did cross it is not stated, and cannot now be known. We cannot perceive of what negligence the defendant was guilty, and think his Honor would have been justified in telling the jury, there was no evidence of any negligence.

PER CURIAM. Judgment affirmed.

JOHN C. McDUGALD v. ALFRED SMITH.

It is no ground of exception to a deposition, that the notice was given to take the depositions of A., B., C., and others, and the deposition of neither A., B., C. was taken.

Where a copy of a statute of another state has been received in evidence in the court below, upon insufficient proof, yet, if it is made to appear to this Court, from an official and proper source, that the copy, so received in evidence, was correct, a *venire de novo* will not be awarded for that error.

Appeal from the Superior Court of Law of Columbus County, at the Fall Term, 1850, his Honor, Judge *Battle*, presiding.

McDugald, for the plaintiff.
Strange, for the defendant.

Nash, J. The action is in assumpsit on a promissory note by the endorsee. The general issue was pleaded, but the execution of the instrument admitted. The note was made in Maryland, where the payers lived. To prove the endorsement, a deposition was offered in evidence, which was objected to, and several reasons assigned. The *first* was the insufficiency of the notice, in this, that it notified the defendant that the evidence of two witnesses, whose names were mentioned, "and others," would be taken; and that neither of the persons, whose names were stated, were examined; but others were, whose names were not stated. *Secondly*, because the witnesses were not examined, on interrogatories; and *thirdly*, because the clerk of the court, in passing upon

the deposition, had given the defendant, or his counsel, no *particular* notice of the time and place of passing on it. These objections were overruled. It was then objected by the defendant, that there was no evidence, that by the laws of Maryland, where the endorsement was made, such an instrument was negotiable. To answer this objection, the plaintiff offered in evidence a paper writing, purporting to be a certified copy of an act of the general assembly of that state upon this subject; its reception was opposed, upon the ground that it was not certified according to law. His Honor being of a contrary opinion, it was received. There was a verdict for the plaintiff, and the defendant appealed. We concur with his Honor in his opinion, as to the admission of the deposition in evidence. To support his first objection, the defendant's counsel cited the case of the *inhabitants of Ninnot against the inhabitants of Bridgewater*, 16th Mass. Rep., 472. We do not consider this case as an authority, by which we can be governed, or even assisted, in our present enquiry. The court, in that case, place their decision upon the statute law of the state. Their language is, "the court being of opinion, that the notice required by *statute* was not sufficient, unless it contained the name of the person, whose deposition was to be taken." There, the notice contained the names of several persons, and nothing more as to any others. Now, it may be, that the statute of Massachusetts requires, in so many words, that the names of all the persons, whose depositions are to be taken, shall be set forth in the notice. If so, the deposition in that case could not be used, as the individual, whose testimony was taken, was not named in the notice. Be this, however, as it may, the court, professedly, only gave their *construction* of the statute, and no doubt gave a sound one. But to make it bear upon our decision, or to assist us in placing a sound construction on our statute—it is not sufficient, that the statutes are in *pari materia;* it was the

duty of the defendant, to shew by proper evidence, that their directions and provisions are the same. This he has not done. Nor do the Court, in their decision, name the statute, so as to enable us to examine it and see how far it corresponds with our act. In the different states, the practice in their several courts is regulated, mostly, by their own statutes and usages, and it would be unsafe, in putting a construction upon our statute, to be governed by that put upon a similar one in a sister state, without knowing what its provisions are. But there is another reason why the decision in Massachusetts, referred to, is not an authority in this case. As before stated, in that case, the notice was to take the deposition of certain specified witnesses, and a person was examined, whose name it did not contain. There the defendant might well say, perhaps, I did not and could not know that any persons would be examined, but those named in the notice, otherwise I should have attended; it is a surprise upon me. In this case he can rightfully make no such allegation; he was apprised that the examination would not be confined to the witnesses named. It was his duty to attend or be properly represented, that he might take care of his interest. The act of our legislature points out no form, in which the notice shall be drawn; it simply directs, that notice shall be given the adverse party, of the time and place, when the "commission shall be executed." So far as the practice under it can be considered a construction of it, the notice complained of is proper. We see no provision in the act forbidding it, and no evil or danger resulting from it. The defendant, however, farther complains on this point, that the persons named in the notice were not examined. We know of no law requiring a party to examine all or any of the witnesses named in the notice. As well might it be required of a party to examine all the witnesses he summonses on a trial before a jury, and who are in attendance.

The 2nd exception to the deposition is properly abandoned.

The 3rd is, that the clerk passed upon the deposition, without giving to the defendant or his counsel any *particular* notice of the time when, &c. The decision upon the first point renders it unnecessary to examine this objection.

In admitting in evidence the paper writing, purporting to be a copy of the law of Maryland, there was error. It was not certified, as required, either by the laws of the United States or of North Carolina. For this error we should certainly direct a *venire de novo*, if it would serve any good purpose. Availing ourselves, as we have before done in other cases, and as we consider our duty to do, of the facilities furnished us by the vicinity of the office of secretary of state, we are satisfied the copy upon the trial was a true and correct copy of the statute of Maryland upon the subject. We have been supplied with a copy of that law, certified as directed by the laws of this state. There is no complaint that the law of Maryland, is not as stated by the Judge, in his charge. The complaint is, that the evidence, upon which his opinion was founded, was insufficient and contrary to law. To what purpose grant a *venire de novo*, where we are satisfied that the law, upon which the case turned, has been correctly stated to the jury? Why send the case back to another jury, where the result must be the same? *Interest reipublicæ ut sit finis litium.*

Per Curiam. Judgment affirmed.

HENRY G. HAMPTON v. DAVID M. COOPER, Adm'r.

Where an executor arrests a defendant on a *ca. sa.*, sued out on a judgment obtained by his testator, and afterwards dies, and the proceedings on the *ca. sa.* are discontinued, and then administration *de bonis non, with the will annexed*, is granted, this administrator is not liable in any way for the costs of the proceedings on the *ca. sa.*

The case of *Matlock* v. *Gray*, 4 Hawks, 1, cited and approved.

Appeal from the Superior Court of Law of SURRY County, at the Spring Term, 1850, his Honor, Judge *Dick*, presiding.

Boyden, for the plaintiff.
Morehead, for the defendant.

RUFFIN, C. J. The action is assumpsit, and, upon the trial on the general issue, the case was this: Stephen Haynes, as the executor of Moses Crissman, obtained a judgment in Surry superior court against Aaron Crissman, and sued out a *ca. sa.* and delivered it to the plaintiff, who was the sheriff of Surry. He arrested the debtor, who gave a bond to appear, and take the benefit of the act for the relief of insolvent debtors. He appeared, and, upon a suggestion of fraud, an issue was made up. Before it was tried, Haynes died intestate; and no further proceedings were had on the issue for more than two terms, and the court discharged the debtor from further attendance. Afterwards, the defendant, Cooper, obtained letters of administration *de bonis non* with the will annexed of Moses Crissman, and this action was brought against

him in that character for the plaintiff's fees and commissions on the execution. The court was of opinion, that the action would not lie, and ordered a nonsuit; and the plaintiff appealed.

We suppose the administrator of Haynes could not have discharged the defendant out of custody, but that the power to do so or to complete the execution belonged to the administrator *de bonis non*, as incident to the debt, which was a part of the original testator's goods unadministered. But, in fact, the defendant did nothing in the matter, but the proceedings were at an end before he administered. Therefore it seems impossible to charge him in any capacity, by implying a promise to pay the plaintiff his commissions. The executor, who sued out the execution, was doubtless liable for the sheriff's poundage, if anybody, besides the debtor, was. The sheriff was not bound to look to the testator's estate for his demand; for that might be insolvent, and he did the work at the instance of the executor himself. Haynes would, therefore, be liable in his natural capacity, if at all. *Matlock* v. *Gray & Harper*, 4 Hawks., 1. If he acted with good faith and reasonable prudence in suing out the *ca. sa.*, and incurring this expense, he might claim to be indemnified out of the assets. That, however, is a different point from the present. We cannot tell, but that Haynes did retain an indemnity out of the assets. Whether he did or not, his personal liability excludes that of the administrator *de bonis non;* for the sheriff cannot have a right to look to both, so as to imply a separate promise from each. At common law there was no privity between the executor and the administrator *de bonis non*, and this case is not within the act of 1824.

PER CURIAM. Judgment affirmed.

WILLIAM GLOVER v. ABRAM RIDDICK.

A conversion, to subject a defendant in an action of trover, consists either in an appropriation of the thing to the party's own use and beneficial employment, or in its destruction, or in exercising dominion over it, in exclusion or defiance of the sheriff's rights, or in withholding the possession from the plaintiff, under a claim of right, inconsistent with his own.

Giving to a negro a certificate that he is free, does not amount to a conversion in the person giving the certificate, if the negro should turn out to be a slave.

Appeal from the Superior Court of Law of PERQUIMANS county, at the Fall Term, 1850, his Honor, Judge *Caldwell*, presiding.

This is an action on the case, and the declaration contains three counts: one in trover for the conversion of two slaves from November, 1847, to August, 1848; one for harboring the said slaves; and one for trading with them.

The facts of the case, as they appeared on the trial, are as follows: In 1843, the plaintiff purchased from one Mitchell two slaves, named Tony and Armistead, then runaway: They were first seen in 1846 or 1847, in Nansemond county, Virginia, passing as free persons of color, under the names of Jack Douglas and Charles White: they worked for several persons, as free persons, and exhibited certain papers, called free papers, to several persons: they purchased goods out of the defendant's store in 1846 and 1847, and settled the account of 1846: they called on the defendant at his store in the said county, and asked him for a certificate of freedom, alleging that they had left their free papers, at some point distant from

the said store: the defendant called on two of the bystanders, to-wit, his clerk, and one Everitt, for the latter of whom they had worked, to state what they knew about their freedom, and they stated, that they had passed as free persons, since they came into the neighborhood, and that they had seen their papers with the county seal appended: thereupon the defendant gave them a paper writing in the following words, to-wit: "Newton, November 8th, 1846. The bearer, Jack Douglas, a very stout black man, about 35 years old, lives in the neighborhood of my cotton factory, is free and of good character; his partner, Charles White, also a stout black man, (not quite so tall as Jack) about 35 years old, is also free, lives in this neighborhood and is also of good character; they are looking for work. (Signed,) Abram Riddick." It also appeared that they remained in the neighborhood until the spring of 1848, when they left, and were apprehended at Weldon by one Scott, in the act of taking the cars; that he committed them to Halifax jail, where they remained six weeks or two months, and from which they were taken, by the plaintiff in August, 1848, and carried to Norfolk; that he paid the jail fees, amounting to forty dollars, and two hundred dollars to the jailer for the said Scott; that the said two hundred dollars were paid in pursuance of a reward he had offered by advertisement for their apprehension in 1843. The entire transaction, as appears, took place in the state of Virginia. The alleged free papers were identified on the trial, and turned out to be forgeries. The said Scott did not know of the reward offered, at the time he apprehended the said slaves. They stated to the defendant, when they applied for the certificate, that they wanted to go elsewhere to get work.

The court charged, that the plaintiff could not recover on the count for trading with the said slaves, because it did not appear, that any law existed in Virginia, prohibiting such traffic; that he could not recover on the count

for harboring, because the mere selling of goods by the defendant, out of his store, would not amount to harboring. On the first count the court charged, that any wrongful dominion, exercised by one man over the property of another, amounted to a conversion, and the giving of the paper writing in question was the exercise of such dominion. To this part of the charge the defendant excepted. On the subject of damages the court charged, that the plaintiff was not entitled to recover the reward of two hundred dollars, nor any other sum by way of reward, as insisted on by his counsel; that he was entitled to recover the value of the hire of the said slaves from November, 1847, to August, 1848, the jail fees by him paid, and his reasonable expenses in going from Pasquotank to Halifax and returning. To the part of the charge, denying the plaintiff the right to recover the reward, as a part of the damages, the plaintiff excepts.

There was a verdict for the plaintiff according to the charge of the court, and from the judgment thereon, both parties appealed.

A. Moore, for the plaintiff:

1st. Was there a conversion?

Any use of or dominion or control exercised over the property of another, without the authority of the owner, is a conversion. Greenleaf on Evidence, 642 section. It was certainly a high violatio· of the rights of the plaintiff, to use his slaves, to place in their possession a paper writing, the effect of which might be, to make it more difficult for the owner to recover his property, and probably to enable them to effect their escape to a free state. Such acts of ownership, exercised over these slaves, continued for three years, would have given the defendant a title to the slaves. *White* v. *White*, 1 Dev. & Bat., 160.

It is not necessary that Riddick should have known to whom these slaves belonged, in order to make his conduct wrongful. If he have not the authority of the owner, the act was a wrong to him—a violation of his rights of property. *Lee* v. *McKay*, 3 Ire., 29.

If the facts of this case do not amount to a conversion, I fear the security of slave property will be very materially lessened. Excuses would not be wanting, for affording them facilities for continuing out of the employment of their owners, or for effecting their escape out of the state.

2nd. The judge ought to have left it to the jury to say, what amount of compensation the plaintiff was entitled to, for the wrong which had been done by the defendant. The slaves had been runaway several years, and if the security of this property had been endangered, or the probability of his ultimately losing them had been increased by the act of the defendant, it was a risk, for which he was entitled to compensation. Similar acts in others might have been the means by which the slaves were kept out of the employment of their owner, and which justified him in exciting public vigilance by offering a large reward.

It was not contended on the part of the plaintiff, that he was necessarily entitled to recover of the defendant the $200 which he paid; but that or such other sum as the jury might think the plaintiff was entitled to under all the circumstances.

The act of assembly encourages the apprehension of runaway slaves, by subjecting the owner to pay a certain sum, to whoever may apprehend them—to this amount the plaintiff is clearly entitled. The policy of the country is in favor of the claim, which the plaintiff sets up to a reasonable reward. I refer to *Greenfield Bank* v. *Leavitt*, 17 Pickering, 1, as deciding it was the duty of the judge to have left it to the jury to say what was the amount of

damages the plaintiff was entitled to—whether the amount paid by him or a lesser sum.

Heath and *Ehringhaus*, for the defendant.

Two questions only are presented:

1st. Has there been any conversion on the part of the plaintiff?

2nd. If so, what is the rule of damages?

1st. A conversion is defined to be, a tortious *taking* of a chattel; a wrongful assumption of property in it; an illegal use of it; or any wrongful act, whereby the defendant deprives the plaintiff of his property for a short time even. Leigh's Nisi Prius, 1477, 1478.

It is submitted that the defendant has been guilty of none of these acts. He has not *taken* the property of the plaintiff, tortiously or otherwise; he has assumed no property in it; he has made no use of it, illegal, or otherwise, nor has he done any wrongful act, *whereby the plaintiff has been deprived of his property for one moment.* He merely expresses an opinion that two negroes were free, who had passed as such, in his neighborhood, for years. There is no evidence that this paper was ever seen, at any time after it was given to the slaves, or that they were kept from their owner, in consequence of possessing the paper, for one moment; and it is submitted, that without such evidence, it is no more a conversion, than it would be, if one were to express the opinion, that a barrel of wine was a barrel of water; indeed, had they been kept from their master, by the aid of these papers, an action on the case, and not trover, would have been the proper remedy.

2nd. Suppose, however, there was some evidence of a conversion to go to a jury, what is the rule of damages? Could the reward paid, be added to the actual damages? Leigh, in his Nisi Prius, page 1500, says the damages

are the value of the property, at the time of the conversion, or at any subsequent time; if the plaintiff have regained his property, nominal damages are generally to be assessed; but such actual damages, as *are necessarily consequent* on the plaintiff's act, may also be given; the paying of this reward, or any reward, was not necessarily consequent on the defendant's giving this paper, since it was never seen in their possession, the person to whom the reward was paid knew not of its being offered more than three years before, and the slaves were runaway, four years previous to the giving of this paper by the defendant: what connexion had the paper, with the payment of the reward? The reward was offered more than three years before the paper was given; the paper, so far as is known, was never seen in the slave's possession, after it was given, and the reward was a voluntary payment, made to a man who had no knowledge of its being offered, and made near four years after it had been offered.

NASH, J. None of the acts of the defendant, which are stated in the case, taken separately or together, amount in law to a conversion. A conversion, to subject a defendant in an action of trover, consists either in an appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it in exclusion or defiance of the plaintiff's right, or in withholding the possession from the defendant under a claim of title inconsistent with his own. Such is Mr. Greenleaf's summary of the acts of a defendant to constitute a conversion in the sense of the law of trover. 2 Vol. of Evi., See 642. Which one of these acts, it may be asked, has this defendant been guilty of? The defendant is a merchant; and in 1846 and 1847 the negroes in question first appeared in his neighborhood, claiming and acting as free men. They remained in that neighborhood

until the 8th of November, 1849, and during that time worked for different persons, openly. They purchased goods out of the defendant's store in 1846 and '47, and settled and paid the account of the first year, and exhibited to various persons free papers, as they are called. On the 8th of November, 1847, they requested the defendant to give them a certificate, that they were free, alleging, that they had left their free papers at a house some distance off. The defendant called on his clerk and a Mr. Everitt, who was in the store, and for whom they had worked, to state what they knew of their being free. They both stated that the negroes had passed as free, ever since they had been in the neighborhood, and that they had seen their free papers with the county seal appended. The defendant then gave them the certificate set forth in the case—in which he certifies they are free. This is the only act, upon which the plaintiff relies to prove a conversion. Admit it was a wrongful act, yet it is not every tortious act, affecting the property of another, that amounts to a conversion; thus, cutting down his trees, without taking them away, is no conversion. *Myers* v. *Solebay*, 2 Mod., 245. The giving of the certificate was certainly a very indiscreet act, to say the least of it, but is no evidence of an act of ownership on the part of the defendant —it expressly disclaims it. His Honor, however, ruled, that the giving the paper writing by the defendant, was the exercise of such dominion over the slaves as amounted to a conversion. In this opinion we think there is error. We agree with his Honor, and for the reasons expressed by him, that the plaintiff cannot recover upon the counts for harboring or trading with the slaves. As, in the opinion of the Court, the plaintiff cannot recover in this action upon any of the counts in his declaration, no opinion is expressed as to the question of damages.

There being no error in the charge, upon the count in trover, upon which the verdict was given, the judgment is reversed and a *venire de novo* awarded.

PER CURIAM. Judgment reversed and a *venire de novo*.

ALEXANDER REID, et al. v. THOMAS PASS, et al.

Where a petition had been filed in the county court by the next of kin of an intestate for the sale of negroes for the purpose of distribution, and a sale had been made by a commissioner appointed by the court, according to the prayer of the petitioners, and he had paid over to them what he alleged to be their full respective shares; it is not competent for these petitioners to file a subsequent, original petition in the same court, charging that the commissioner had not paid them their full shares, (they having signed a receipt in full by mistake) and requiring the commissioner to account, &c., and to pay over the balance, &c.

Their relief could only be obtained by an application to the county court for a hearing, if the proceedings of the commissioner had been confirmed, or by recourse to a court of equity to set aside the receipt, if given through mistake.

Appeal from the Superior Court of Law of CASWELL County, at the Fall Term, 1850, his Honor, Judge *Manly*, presiding.

Morehead, for the plaintiffs.
Kerr, for the defendants.

NASH, J. Whatever may be the merits of the petitioners, they cannot in these proceedings obtain the relief they seek. The petition was filed at the September

term, 1849, of Caswell court of pleas and quarter sessions; and set forth, that, at January term, 1849, of the court, the defendant, Pass, as executor of Thomas Reid, dec'd, filed a petition against the petitioners, as next of kin with the testator of John Gamble, dec'd, for the purpose of selling a parcel of negroes belonging to the estate of John Gamble, in order to make a division among the next of kin; that a decree was made for the sale and distribution of the proceeds, and Thomas Pass, the present defendant, was appointed by the court a commissioner for that purpose, who duly sold the negroes and paid over to the petitioners what, he alleged, was their proper shares, for which they gave him a receipt in full, dated in August, 1849. The petitioners allege, that the receipt was written to be in full by mistake and not so intended to be by them, as a considerable sum is still due them as next of kin of John Gamble. The prayer of the petition is, that the court will "cause a copy of this petition, together with the state's writ of subpœna, to be issued and served on the said Thomas Pass, as *commissioner aforesaid*, and as executor of Thomas Reid, requiring him to appear," &c., "and full, true and perfect answer make," &c., "and also to account and pay to the petitioners the balance," &c. The proceeding throughout is an original one in the county court against Thomas Pass as an officer of the court, and acting as their commissioner. What has become of the first suit, we are not informed. It may be still pending, or there may have been a report and final decree. Whichever may be the case, it is evident the petitioners have mistaken their remedy. If the defendant, Pass, has in his hands any money arising from that sale, which rightfully belongs to the petitioners, he holds it still as commissioner, and it is under the control of the court and subject to such order as they may make. The proper course for the plaintiffs to have taken in the court of law was to move in that cause, either when the com-

missioner made his report, or by the necessary steps, to procure a rehearing or review of such decree as may have been made. This proceeding cannot be sustained. So far as the setting aside the receipt complained of is involved, the county court, as an original matter, has no jurisdiction, but as incidental to the discharge of his duty by its commissioner, it has power both to hear and to grant redress. To a court of equity belongs the original jurisdiction in such matters.

The decree made by his Honor below is affirmed, and the petition dismissed with costs.

PER CURIAM. Decree affirmed and petition dismissed.

THOMAS THREADGILL v. JOSEPH WHITE.

Where notice has not been given to produce a bill of sale or other instrument of writing, or where its absence is not satisfactorily accounted for, it is not competent to introduce, as evidence of the execution or contents of the instrument, the oral admissions or declarations of the alleged maker.

A party cannot introduce secondary evidence of the contents of a written instrument, merely upon shewing that the instrument, though in existence, is in another state.

The case of *Davidson* v. *Norment*, 5 Ire., 555, cited and approved.

Appeal from the Superior Court of Law of ANSON County, at the Fall Term, 1850, his Honor, Judge *Battle*, presiding.

This is an action of assumpsit, which was tried on the general issue. The case was, that the defendant as sheriff sold some slaves under writs of *fieri facias* against the

plaintiff; and the present suit was brought to recover a surplus of the proceeds after satisfying the executions. The defense was, that the plaintiff was not entitled to the surplus; because the slaves were not his, but he had conveyed them by deed to one Colson before the defendant took them. In support of the defense evidence was given, that Colson had removed from this state and carried the bill of sale with him; and then the defendant offered a witness to prove the contents of the deed. But, upon objection by the plaintiff, the court ruled out the evidence, because the non-production of the instrument was not sufficiently accounted for. The defendant then offered a witness to prove, that the plaintiff, upon his examination as a witness in a suit brought by Colson for the slaves, stated that they belonged to Colson and that he, the plaintiff, had no interest in them. But the court refused to receive the evidence; and, after a verdict and judgment for the plaintiff, the defendant appealed.

Dargan and *Strange*, for the plaintiff.
Mendenhall, for the defendant.

RUFFIN, C. J. It is understood from the case, that the mode, in which the title to the slaves was supposed to have passed from the plaintiff to Colson, as proposed to be established by proof of the declarations of the plaintiff, was by the deed of conveyance, which the defendant had previously alleged. That presents the enquiry, whether it be competent to prove the title of Colson derived under the supposed deed—in other words, the contents and operation of that instrument—by oral testimony of the plaintiff's admissions on those points. The Court is of opinion, that it is not. It is to be observed, that the title to the slaves is the gist of this controversy; and therefore that the execution, terms, and legal effect of the deed, by which

it was alleged to have passed, were directly in issue. It is perfectly settled, that the evidence of its execution, if produced, must be by the subscribing witness, and that the want of that evidence cannot be supplied by proof of the party's admission *in pais*. Much less, it would seem, can such an admission supply both the place of the subscribing witness and the production of the instrument. There have been cases in which, as exceptions to the general rule of evidence, the admission of a fact by a party was considered sufficient to dispense with the regular proof of deeds. They are not numerous, and are stated in 1 Phil. Ev., ch. 7, sec. 6; and they seem to be in cases in which the subject of the deed was collateral to the principal thing in issue. There appears, however, to have been much conflict of opinion on the admissibility of such declaration: and it is admitted, that the Court of Exchequer has held, that an admission of the party is competent evidence of the contents of a deed, so as to dispense with its production and proof of its execution, even when the contents are directly in issue. *Slatterie* v. *Pooley*, 6 M. & W., 663. That decision has been followed by other cases, in which the doctrine has been either laid down or assumed, so that, perhaps, it may be said to prevail at this time in that country. It has, however, been stoutly resisted both on the bench and by reputable writers. The Chief Justice of Ireland, in *Lawless* v. *Queale*, 8 Irish Law Rep., 385, did not hesitate to follow Lord TENTERDEN, in *Blosam* v. *Elsee*, Ry. & M., 187, and said, that the doctrine of *Slatterie* v. *Pooley*, was most dangerous, as it opens the door to fraud and surprise by false testimony of the contents of a deed in the form of the party's admission, instead of giving the deed itself. It seems to be in direct opposition of principle: the evidence being received as primary, and the production of the deed, and notice to produce it, and direct proof of its execution, being dispensed with. For, if it be attempted to prove the

contents by a person, who has read it, the law will not hear him, even after proof of execution, unless the non-production of the deed be accounted for; and the reason is, that the law will not trust to the frail memory of any man upon that point, when the higher grade of evidence, constituted by the instrument itself, is kept back. There is evidently the same reason for refusing the evidence of a person, who deposes upon his recollection of what the party said of the contents. That is, indeed, going a step farther than in the former instance, since there is not only danger, that the witness may have misunderstood or not fully remembered what the party said, but also that the party may not have remembered and understood the terms and effect of the deed correctly. The incongruity will be the more readily seen, if we suppose the same witness, who is called to prove the party's admissions of the contents of a deed, to state also, upon further examination, that he, upon his own knowledge and remembrance, could state the contents, and that they were entirely different from those stated by the party, so as to shew that the party by mistake understood the deed to operate more strongly against him than in fact it did. Would it not seem as strange a thing as can be, that the better recollections of the witness, as they may be, of the contents of the instrument—which, perhaps, he attested—should not be admissible, while his recollections of the party's declared and mistaken recollections, as to the contents, should be sufficient to establish them? There is clearly in each case the danger, that the court and jury may be misled; on which the rule of evidence rests, which rejects inferior evidence, because better may be had, and upon that ground requires the production of deeds as the best proof of their contents. In this country that view seems to have been generally taken of the question. In *Welland Canal Company* v. *Hathaway*, 8 Wend., 484, the rule is stated in very correct terms, as it seems

to the Court by Mr. Justice NELSON, now of the Supreme Court of the United States. After citing several cases, he laid it down, as an undeniable proposition, that the admissions of a party are competent evidence only in cases where parol evidence is admissible to establish the same facts, or, in other words, where there is not, in the judgment of the law, higher and better evidence in existence. He said further, that it would be a dangerous innovation upon the rules of evidence to give any greater effect to the admissions, unless in open Court; and the tendency would be to dispense with the production of the most solemn documentary evidence. No case to the contrary in this country has been found; and it is in the experience of each member of the Court, that in this state the rule on the circuits has always been to require the deed itself. The present is the first instance in which a question has been raised on it, and the Court feels bound to abide by the old rule.

As to the other point, that secondary evidence of the contents of the deed was admissible, because the deed, though in existence, was in another state, the case of *Davidson* v. *Norment*, 5 Ire., 555, is a direct authority the other way.

PEARSON, J. Is it competent to prove the admissions of a party, as to the contents of a writing, without notice to produce it, or accounting for not offering the writing itself?

According to the English cases, such evidence is competent, upon the ground that the admissions of a party against his own interest is *primary* and not *secondary*, evidence. *Slatterie* v. *Pooley*, 6 M. & W., 663, *Regina* v. *Welch*, 2 Car. R., 61 E., ch. 1. sec. 296. One of the points on the trial at *nisi prius* was the admissibility of declarations of the defendant, as to his appointment, which was in writing. The case was reserved for the consideration of

the fifteen judges; and when it was called for argument, the prisoner's counsel abandoned the point, as *not debatable.* "According to the case of *New Hall* v. *Holt*, 2 M. & W, 662, and *Slatterie* v. *Pooley*, id., 653, I must concede, that admissions made by a party, as to the contents of a written document, are evidence against him." See Best, on the principles of evidence.

After much reflection, according to my judgment, the "reason of the thing" is against the admissibility of the evidence. I therefore concur in the opinion, that the evidence was not admissible.

PER CURIAM. Judgment affirmed.

SALLY A. TARKINTON v. CHARLES LATHAM, Adm'r.

Where a grand-father, since the act of 1806, made a parol gift of a negro woman slave to his grand-daughter, and placed the slave in possession of the grand-daughter's father, with whom she lived, as her property, and the negro was always alleged by the father to belong to the grand-daughter. *Held*, that the father, and, of course, any person claiming under him, were estopped to deny the grand-daughter's title.

Appeal from the Superior Court of Law of WASHINGTON County, at the Fall Term, 1850, his Honor, Judge *Caldwell*, presiding.

This was an action of trover, brought to recover a negro woman, a slave, by the name of Marina, and her two children.

The plaintiff proved, that Marina was once the property of Zebulon Tarkinton, who made a parol gift of her to his grand-daughter, the plaintiff, when she was an infant, and quite small. At the time of the gift, the slave was delivered to the plaintiff, by the grand-father's taking the hand of Marina and placing it in the hand of the plaintiff; and, thereupon, Joseph Tarkinton, the plaintiff's father, with whom she was living, took possession of Marina, for and on behalf of his daughter, and continued that possession, repeatedly declaring that Marina was not his property but belonged to the plaintiff, until shortly before his death, when he sold and delivered the slave to Thomas Myers, the defendant's intestate. The plaintiff was about 21 years of age at this trial, and was proved to have lived in her father's family, 'till his death in the year 1841.

Zebulon Tarkinton, the grand-father, died in the year 1834, a few years after the gift. Shortly after the death of Zebulon Tarkinton, and at the sale of his personal estate, one ——— Spruill, who conducted the sale and professed to be the administrator, enquired of Joseph Tarkinton, for Marina, and demanded her of him, that he might sell her as the property of said Zebulon. Joseph Tarkinton refused to deliver her or permit her to be sold, declaring that she was the property of his daughter, and had been given to her by her grand father, the said Zebulon, and referred to the witnesses, who were present when it was done. One of the witnesses appealed to was the said Thomas Myers, who thereupon stated, that himself, and another witness, were called on to witness the gift: that the said Zebulon did give and deliver Marina to the plaintiff, for a nurse, and that Joseph Tarkinton then took possession for his daughter. Marina was not present at this sale, but was then in possession of Joseph Tarkinton, and was at his house.

It was further proved, that Joseph Tarkinton, while Marina was in his possession, claimed her for the plaint-

iff, declaring at some times that she was his daughter's property, at others that she was given to his daughter by her grand-father in presence of two witnesses; and that Myers had often expressed a wish to purchase Marina, but said he could get no title as she belonged to the plaintiff.

Myers purchased Marina of Joseph Tarkinton, in the year 1841, shortly before which he remarked to a witness, "I can now try and get a good title to Marina, from Joe Tarkinton, for the other witness to the gift is dead, and I cannot be compelled to swear against myself."

No will of Zebulon Tarkinton was offered in evidence, and to show that the said ——— Spruill was administrator, the plaintiff offered to prove that he took possession and sold the goods and effects of said Zebulon, and acted as administrator, in the settlement of his estate, and further that at the sale referred to, which was conducted by him as administrator, the said Myers became purchaser of part of the property sold. This evidence was objected to by the defendant, but the presiding judge, reserving the question of its admissibility, permitted the proof to be made. It was admitted that Myers had converted to his own use, the slave Marina, and also two children, born after his purchase from Joseph Tarkinton, and before suit.

It was insisted for the defendant, that the plaintiff could not recover, for that she acquired no title by the gift, nor had she such an adverse possession against Joseph Tarkinton, as would transfer to her the title to the said slrve.

The court charged the jury, that, although the parol gift in the first instance conveyed no title to the plaintiff, yet if the possession of the slave in question were held by her, or by her father for her, and, upon a demand being made by the said administrator to sell said slave, her surrender was refused; and therefore she was held by the

plaintiff, or by her father for her, three years adversely to the title of said administrator; the plaintiff would be entitled to recover.

The jury returned a verdict in favor of the plaintiff. Rule for a new trial for misdirection to the jury, and because of the admission of improper evidence. Rule discharged, judgment and appeal.

Smith, for the plaintiff.

A. Moore, for the defendant, submitted the following argument:

1st. The evidence, that Sprulll acted as administrator, in order to prove that he really was, was inadmissible. All the books on evidence lay down the rule to be, that, when an administrator sues upon a cause of action, that arose in the lifetime of his intestate, he must either make a profert of his letters of administration, or upon oyer, they must be exhibited; if he sues upon a right of action, that has accrued since the death of the intestate, the plea of the general issue makes it necessary for him to exhibit his letters, as a part of his proof.

If, therefore, Spruill was not the administrator of Zebulon Tarkinton, the plaintiff very clearly has no title. For the parol gift passed none, and no adverse possession, since the death of Zebulon Tarkinton, has been held by the plaintiff, against any one who could sue.

2nd. If the evidence offered established the fact, that Spruill was the administrator of Zebulon Tarkinton, it is then insisted, on the part of the defendant, that the plaintiff has no title.

It is laid down in Story on Bail, 79–80, if A. delivers goods to B., to be delivered over to C., then C. hath the property and may demand the goods. That principle manifestly applies to such articles of personal property, the title to which passes by delivery. It cannot be applied to

slaves, as our act ofa ssembly makes all attempts to dispose of them by gift void, unless by a deed of gift properly attested.

The gift, then, to Joseph Tarkinton, for his daughter, was a mere bailment, to continue in the will of the bailor or bailee.

Nor can the plaintiff make out her title under the statute of limitations. When the demand was made of Joseph Tarkinton, by Spruill, he refused to deliver up the negro, alleging that his father had given the negro to his daughter. This gave Spruill a right of action against Joseph Tarkinton, but not against the plaintiff in this action. She had no possession of the negro, and set up no claim to her, in opposition to the rights of the personal representative of Z. Tarkinton. If Spruill could maintain no action against this plaintiff, then it is clear that the statute of limitations did not run in her favor. And for the reason, that the action could be maintained against Joseph Tarkinton, upon his refusal to deliver the property, the statute then commenced rnnning, and would confer title upon him, at the expiration of three years. A possession to be adverse need not be accompanied with a claim of title. *White* v. *White*, 1 Dev. & Bat., 260.

The case shews that the plaintiff never had an adverse possession of this slave.

3rd. Joseph Tarkinton was not the bailee of the plaintiff. It is a necessary part of every contract of bailment, that the article bailed should be delivered by the bailor or his authorized agent to the bailee. Story on Bailments, 1 and 2.

4th. The plaintiff's right to recover, then, rests entirely upon the declaration of Joseph Tarkinton, that he held the property for her. Such a declaration cannot pass the title. *Jones* v. *Sasser*, 1 Dev. & Bat., 452.

RUFFIN, C. J. The plaintiff could have entertained this action against her father upon her coming of age. He could not have set up the grand-father's title against her, because he did not receive the negro to hold for the owner, whoever that might be, but, he received her expressly as his daughter's, and engaged to hold her as the agent of the plaintiff and for her. He could not, therefore, dispute her right, but was estopped to deny it. That estoppel was imparted to Myers, as he bought and received the slave from the father, and thus became his privy in estate; and it extends to the defendant, the administrator of Myers. The verdict and judgment, were, therefore, clearly right on that ground; and as they rest upon the estoppel, arising out of the relation of bailor and bailee, or principal and agent, between the plaintiff and her father, any particular demerits of Myers are not to be regarded, since the estoppel would affect any other purchaser from the father in the same manner.

PER CURIAM. Judgment affirmed.

DANIEL McNAIR v. JOHN A. McKAY, Adm'r, &c.

No action at law can be maintained, to collect the assets of a deceased man, except by his personal representative; but where A., claiming a slave as a distributee of B., employs C., to sell such slave, and C. accordingly sells the slave and receives the price, he receives it for the use of A., and cannot dispute the title of A., but is bound to account with him for the sum received,

The case of *Dunwoody* v. *Carrington*, 2 Car. L. R., 469; *Means* v. *Hogan*, 2 Ire. Eq., 525, and *Love* v. *Edmunds*, 1 Ire., 152., cited and approved.

Appeal from the Superior Court of Law of BLADEN County, at the Fall Term, 1850, his Honor, Judge *Battle*, presiding.

This was an action of assumpsit,, in which the plaintiff declared for money had and received, and in the other money courts. Pleas "the general issue, statute of limitations."

On the trial the evidence was, that, some time in the year 1848, the defendant's intestate sold a negro slave named Jack for seven hundred and fifty dollars, and received four hundred dollars, part of the purchase money, and said that he was acting as the agent of the plaintiff. The negro Jack had belonged to one Dugald Blue, who died in the month of August, 1828, leaving five children, with one of whom named Annie, the plaintiff intermarried.

The purchaser said he thought he had paid the balance of the purchase money for Jack, to John F. Blue, who was one of Dugald Blue's children. Another witness testified, that, in 1842 or 1843, he believes in the latter year,

he endorsed a note for the intestate to enable him to borrow some money from the bank, the intestate saying he wanted it for the plaintiff, who was expected to come in from Tennessee where he resided.

The intestate said afterwards, he had laid out the money in the purchase of goods. He died in the fall of 1844. And the defendant took out letters of administration on his estate, and in October, 1846, the plaintiff, by a regularly constituted attorney, made a demand upon him for the money, which his intestate had received as the plaintiff's agent for the sale of Jack. The defendant refused to pay the amount claimed, which was one-fifth of the whole purchase money with interest: and the suit was commenced in 1848. There was no distinct evidence, that any letters of administration had been taken out on the estate of Dugald Blue, dec'd, and the defendant contended, that, whether there was or not, the plaintiff could not recover, for if there had been no administration, no person could claim the slave Jack, or his proceeds, except as administrator of the said Dugald Blue, and if there had been an administration, the slave or his proceeds belonged to such administrator, or, if he were dead, to an administrator "*de bonis non.*"

The court instructed the jury, that the principles of law, contended for by the defendant, were correct, and would determine this case in his favor, if the length of time and other circumstances would not enable them to make such presumptions, as would support the plaintiff's title—that, if they found that the defendant's intestate had possession of the slave, on the day of sale, eighteen years after the death of Dugald Blue, or the plaintiff's agent had sold him as such, and subsequently acknowledged that he held the proceeds of such slave for the plaintiff as his agent, they were at liberty to make any, and every presumption, as against the defendant's intestate, to support his right to

recover. The jury under this instruction returned a verdict for the plaintiff, and the defendant, after an ineffectual motion for a new trial, for misdirection by the court, appealed to the Supreme Court.

McDugald, for the plaintiff.

D. Reid and *Banks*, for the defendant.

Nash, J. We see no such error in the charge of the judge below, as to authorize this Court to interfere with the judgment. The plaintiff is entitled to retain his verdict. It is not denied that John McKeethan, the intestate of the defendant, as the agent of the plaintiff, sold, in 1838, a negro man slave, and received the purchase money, which he converted to his own use. The money, so received by the intestate, was received by him to the use of the plaintiff. On the part of the defendant, however, it was insisted, that the slave so sold by the intestate, had belonged to one Dugald Blue, who died intestate in the year 1820, and that no action could be brought to recover the proceeds of the sale, except by his administrator. The principle contended for is correct, No action at law can be maintained, to collect the assets of a deceased man, but by his personal representative. This is not a case, however, for its application. The action is not brought to collect in the assets of Dugald Blue; but the plaintiff seeks to recover the money in contest, upon a personal contract with the intestate, John McKeethan. If an action had been brought by the plaintiff against the intestate, to recover the negro, before the sale, or the proceeds of the sale, the intestate could not have been heard to deny the title of the plaintiff in either case; so neither can the defendant who stands in his place. See *Dunwoody* v. *Carrington*, 2 Car. L. R., 469; *Means* v. *Hogan*, 2nd Ire. Eq., 525; *Love* v. *Edmonds*, 1 Ire. Rep., 152, Story on Agency, sec. 217.

Per Curiam. Judgment affirmed.

THEOPHILUS M. BELL v. WILLIAM B. TOOLEY.

A court martial is a court of special and limited jurisdiction. It must be organized agreeably to law, and this must be shewn distinctly by every one, who seeks to enforce its sentences or justify action under its precepts. Therefore, where a company court martial, as is required by our law, must be composed of at least two commissioned officers, and it did not appear in this case that more than one commissioned officer sat in the court, an execution, issued by a tribunal so constituted, is void and does not justify an officer in acting under it.

Appeal from the Superior Court of Law of HYDE County, at the Fall Term, 1850, his Honor, Judge *Ellis*, presiding.

Rodman, for the plaintiff.
Shaw, for the defendants.

NASH, J. The action is in trover, to recover the value of a horse belonging to the plaintiff, and alleged to have been converted by the defendant. The defendant, who was a duly qualified officer of Hyde county, justified under process issued by a military court martial. To sustain his defense, he produced a paper writing, purporting to be a judgment rendered by a company court martial, composed of William Fisher, as acting captain, Major O'Neal, as acting lieutenant, and the ensign of the company, against the plaintiff, for the amount of a fine imposed on him for not attending the preceding muster of the company, of which he was a member; a paper writing, purporting to be an

execution signed by William Fisher, as captain, to collect from the plaintiff the amount of the judgment, was also offered in evidence by him; and, after objection, admitted by the court. By color of this paper, the horse in question was levied on, and sold by the defendant. He also introduced a paper, under seal of the state, purporting to be a commission to Fisher, as captain of the company, and bearing date before the sitting of the court martial, at which the judgment was given, but no commission to either of the other officers, who sat on the court martial, was offered. It was proved by the commanding officer of the regiment, that he had administered the oaths of office to Fisher and O'Neal. The reception of this testimony was opposed by the plaintiff, but admitted. The plaintiff objected to the reception in evidence of the alleged judgment and execution: *First*, because it did not appear, that the officers comprising the court martial were commissioned officers and authorized to hold a court martial; *Secondly*, because it did not appear, that the said officers had been duly qualified by taking and subscribing the oaths required by the act of the general assembly. Rev. Stat., ch. 73, sec. 31. *Thirdly*, because the judgment was void, the plaintiff never having had any notice of the proceedings against him. To sustain his first objection, he offered to prove, that the commission to William Fisher, offered in evidence, had been issued in blank and filled up with the name of William Fisher by the commanding officer of the regiment, to which the company belonged, after the conversion by the defendant; and that Fisher was not duly elected by the company. The court overruled the objection in the commission.

The jury were instructed, that, if the defendant, at the time he took the horse, had in his hands an *execution*, upon its face regular, and issued *by a court martial*, hav-

ing jurisdiction of the subject matter, he would be justified: that, in this case, the *execution* appeared upon its face to be regular, and would justify the officer, if they should be of opinion, that the officers of the court martial were elected by a majority of the company and, at the time they rendered the judgment, the *acting* officers of the company.

We do not concur in the above opinion. The error of his Honor consisted, in considering the paper, purporting to be an execution, to be a valid one. The objection is, that it is not an execution, and therefore could confer upon the defendant no authority whatever.

The first and second objections of the plaintiff to the justification, relied on by the defendant, are to the organization of the court. They raise the question, had the individuals, assuming to act as a court martial, any legal right to perform the duties of such a tribunal? If they had, then his Honor was correct, as to the effect of the execution, in protecting the officer. If not, there was no legal tribunal, and the whole proceedings were *coram non judice*, and entirely void. A court martial is a court of a special and limited jurisdiction, called into existence for a special and limited purpose. It exists only temporarily, and when the business for which it is called is transacted, it ceases to exist. Such a court must be organized agreeably to the law, and this must be shewn distinctly by every one, who seeks to enforce its sentences or to justify action under its precepts—the law will intend nothing in its favor. *Brooks* v. *Adams*, 11 Pick. Rep., 441; *Mills* v. *Martin*, 19 John. Rep., 7; *Wise* v. *Withers*, 3 Cranch, 331. In the latter case, Chief Justice MARSHALL declares, that "the decision of such a tribunal, in a case clearly not within its jurisdiction, cannot protect the officer, who executes it." Much more must it fail of such an effect, where, from a defect in

its organization it fails to be a court. The court martial in this case was ordered under the provisions of the act of 1836. Rev. Stat., ch. 73. By the 16th section, "the captain or commanding officer of a company shall muster his men at least twice in the year," and it is made the duty of every private to attend the musters, under a specified penalty. The 17th section authorizes "the *commissioned* officers of the company or any two of them to meet in court martial, and proceed to try and determine on all cases, that shall be brought before them," &c. This requisition was not observed in constituting the court marshal in this case. It is stated in the bill of exceptions, that Fisher was the acting captain of the company, and O'Neal the acting lieutenant, and that the court martial was composed of them and the ensign of the company. Admit that the commission to Fisher was legal, it is not pretended, that either O'Neal or the ensign ever had been commissioned, and it is explicitly stated, that no commission for either of them was produced on the trial. This section of the act requires, that a company court martial shall be held by the *commissioned* officers of the company or any two of them. To constitute, therefore, a legal company court martial, there must be at least two commissioned officers. Here, giving the defendant all that he could ask, there was but one.

His Honor erred in rejecting the evidence offered by the plaintiff, to shew that the commission to Fisher was issued in blank and filled up after the conversion. The evidence rejected is to be regarded *pro hac vice* as true. Without enquiring into the objection that the commission issued in blank, here it was shewn that the blanks were not filled until after the conversion; and proves conclusively that the court was not organized according to law.

There is nothing in the third objection of the plaintiff. No personal notice to the plaintiff of the time of the trial

was, under the act of 1836, unnecessary. The 32d section provides, that the calling of the names of the delinquents or absentees by the captain or commanding officer, and the proclamation made for their attendance at the succeeding court martial, shall be sufficient notice. This provision is a strong reason for holding court martials, in their organization, to a strict compliance with the law.

For the errors pointed out in the opinion of his Honor, the judgment must be reversed and a *venire de novo* awarded.

PER CURIAM. Judgment reversed and a *venire de novo*.

WALDO and SHERROD v. ROBERT BELCHER.

Where a person had in store three thousand one hundred bushels of corn, and sold twenty-eight hundred bushels of it to A., but the 2,800 bushels were never separated from the 3,100 bushels and the whole was afterwards destroyed by fire; *Held*, that the property in the 2,800 bushels had not passed to A., as there had been no delivery; and therefore A was not bound to pay the stipulated price. And this result follows, whatever may have been the intention of the parties, as to the property passing presently, on the contract being made.

The cases of *Devan* v. *Fennell*, 2 Ire., 36, and *Allman* v. *Davis*, 2 Ire., 12, cited and approved.

Appeal from the Superior Court of Law of PITT County, at the Fall Term, 1849, his Honor, Judge *Bailey*, presiding.

B. F. Moore and *Biggs*, for the plaintiffs.
Rodman, for the defendant.

PEARSON, J. Ferguson & Milhado, of Norfolk, had in store for the plaintiffs 3,134 bushels of corn. On the 25th of March, 1848, the plaintiffs sold to the defendant 2,822 bushels of the corn at $2.60 per barrel; and in payment took the bill of the defendant, (which was never paid and was returned at the trial,) and gave the defendant an order upon Ferguson & Milhado for the corn, which order was returned by them to the defendant. On the 2d of May, 1848, the parties agreed, that the plaintiffs should draw a bill on Ferguson & Milhado for $117.66, at ninety days, which the defendant should endorse; that the corn, mentioned in the order, should be subject to the control of the defendant, and should be sold by him before or at the maturity of the bill, and the proceeds applied to the payment of the bill; and if the proceeds should be more or less than the amount of the bill, it was to be a matter for future adjustment. The bill was accordingly drawn and endorsed, and accepted by Ferguson & Milhado, who paid it to the endorser, by whom it was discounted for the plaintiffs, and it was finally repaid to Ferguson & Milhado by the plaintiffs. The whole of the 3,134 bushels of corn remained credited to the plaintiffs, on the books of Ferguson & Milhado, until June, 1848, when it was destroyed by fire. The 2,822½ bushels *were never separated from the bulk of* 3,134 *bushels.*

The action was assumpsit for the price of 2,822½ bushels of corn at $2.60 per barrel, making $1,467.15. The court charged, that, if the plaintiffs, on the 25th of March, delivered to the defendant, and he accepted the order for the corn, the property passed, and the subsequent loss by fire fell on the defendant. And if the property did not pass by the transaction of the 25th of March, it did pass by the agreement of the 2nd of May, if the evidence was believed.

The defendant excepts to the charge; and we think there is error.

To entitle the plaintiffs to recover, the property of the corn must have passed to the defendant, so as to make it his corn when it was burnt. We think the property did not pass, either by what was done on the 25th of March, or on the 2nd of May: because the corn was not in a condition to be delivered. The 2,822½ bushels were not separated from the bulk. It could not, therefore, be identified —it was not specific. The defendant could not tell what corn was his.

We are relieved from the necessity of discussing this question: because it is settled by several cases directly in point. *White* v. *Wilks*, 5 Taunton, 176. The agreement was for twenty tons of oil in the vendor's cisterns, and, in point of fact, the cistern contained much more than twenty tons. Held at *nisi prius*, that no property passed; because the contract did not attach on any particular portion of the oil. The Common Pleas approved of the decision. One of the judges says, "suppose a part of the oil had leaked out, can any one say whose oil it was?" So, in *Bush* v. *Davis*, 2 M. & S., 397. The agreement was for ten tons of flax at "Davis' wharf, by vrow Maria." The vendors had more than ten tons at "Davis' wharf by vrow Maria." The King's Bench decided, that no property passed, although an order was given for ten tons and was accepted by the wharfinger. LE BLANC, J., says, "it was to be ascertained what goods the vendee was to have." something was to be done to ascertain the *individuality*. Blackburn on Sales, 124, 56 L., lib. 68, and the cases there cited. *Austin* v. *Craven*, 4 Taunton, 644.

It was insisted, that, in this case, no measuring was necessary or intended to be made, and there was no reason, why the defendant should desire his corn to be separated from the bulk, until he made sale of it, and that the parties

intended by what was done to deliver the corn—to pass the property as an executed contract; and so was distinguished from *Devan* v. *Fennell*, 2 Ire., 36.

It is true, when the property is specific and is in a condition to be identified and delivered, and the intention is proven to be, that the property shall *presently pass*, it does pass; although something remains to be due, as to put bows upon a wagon, which was sold and delivered, *Allman* v. *Davis*, 2 Ire., 12, or to measure, or to weigh, so as to ascertain the precise amount. For instance, if I sell *all* the corn in a certain crib at $2.60 per barrel, and it is the intention that the corn shall presently pass to the purchaser and become his property, it does pass, although it is necessary afterwards to have the corn measured to ascertain the amount and fix on the sum to be paid; because, supposing the thing to be in a condition to be delivered, the fact, that something remains to be done to ascertain the quantity and fix the amount to be paid, only raises a presumption, that it was not the intention of the parties, that the property should pass, until the weighing or measuring was done. *Devan* v. *Fennell*, 2 Ired., 36. But this presumption may be rebutted, and the property does pass, if the jury are satisfied, that such was the intention. *Allman* v. *Davis*, 2 Ire., 12.

But it must be borne in mind, that this is only true in regard to such things as are *in a condition to be delivered*. If the corn is in bulk, so that there is no telling what corn in particular was sold, there the property does not pass; although it was the intention of the parties to consider it as delivered and that the property should pass. The intention may rebut a presumption, but it is impossible by an intention to change an *indefinite* into a *definite* thing. If I sell one hundred bushels of corn in my crib, which contains a thousand, although the purchaser pays me the money, and it is the intention, that the property therein shall presently pass to him, yet it does not pass;

because, it is *physically impossible.* It cannot be told what corn is his, until it is separated. The purchaser could not bring detinue; because he cannot describe the specific thing; and if any of the corn in the crib be stolen or damaged, before the one hundred bushels are delivered, can it be told whose corn it was? Or rather, would not the purchaser have the right to call for one hundred bushels of sound corn, the loss or damage to the contrary notwithstanding? The vendor should have required the vendee to assume the risk, when the corn was put at his disposal.

PER CURIAM. Judgment reversed and *venire. de novo* awarded.

ALEXANDER McD. WILLIAMS, et al. v. JOSHUA BRYAN, et al.

A bond given by a person arrested on a *ca. sa.* for his appearance at court is required by our law to be made payable to the plaintiff in the execution; a bond, otherwise payable, for that reason alone, will prevent the court from entering a summary judgment.

Where a person, arrested on a *ca. sa.*, gives a bond payable to A. B., who makes the affidavit for the *ca. sa.* and styles himself the agent of C. D. the plaintiff, no action can be maintained on such bond, in the name of C. D., for he is not the obligee.

Appeal from the Superior Court of Law of BLADEN County, at the Fall Term, 1850, his Honor, Judge *Battle*, presiding.

Alexander McD. Williams obtained a judgment against Joshua Bryan in Bladen county court, for $11.91 debt,

and $66.89 costs, and sued out a *ca. sa.* thereon, upon which Bryan was arrested by the sheriff. The affidavit on which the *ca. sa.* was issued, was made by William H. White, who states therein that he is the agent of the plaintiff in that suit; and the sheriff took a bond from Bryan and two others, as his sureties, for his appearance, in the sum of $155.60, payable "to William H. White, agent for Alexander McD. Williams." The execution and bond were returned to the next term. But Bryan did not appear, and thereupon a motion was made against the obligors in the bond. But the court refused it and ordered the bond to be delivered up, and thereupon White appealed. In the superior court a motion was again made on behalf of Alexander McD. Williams for judgment on the bond, which was resisted on the part of both Bryan and his sureties. But the court was of opinion, that, inasmuch as Bryan did not appear in the county court, the suit was undefended, and therefore gave judgment in favor of Alexander McD. Williams, for the penalty of the bond, to be discharged by the payment of the debt and costs. The defendants appealed.

Troy, for the plaintiffs.
Strange, *McDugald* and *D. Reid*, for the defendants.

RUFFIN, C. J. The judgment cannot be supported. The acts of assembly directs the bond to be made payable to the plaintiff in the execution, and for that reason, if no other, there could not be a summary judgment on this bond. But, if that were otherwise, clearly Williams cannot have a judgment in his name on a bond payable to White, though White be therein stated to be his agent; for only an obligee can maintain an action on the obligation. It is true, the debtor cannot, after failing to appear,

adduce any matter of fact by way of defense. But that is not material to the present question; which is, whether the party, who moves for the judgment, shews a case on which he is entitled to judgment against the defaulting debtor. The case may be likened to a default in an action of debt, in which the declaration states a bond to A., without deriving any title from A. to the plaintiff; upon which, certainly, it would be erroneous to give judgment against the defendant, though in default. Here the creditor's own case—the bond, upon its face—showed that Williams could not have judgment on it in any form of proceeding—whether by action or motion. The default admits the whole case stated in the declaration in the one case, or in the bond in the other. But it admits no more, and does not authorize a judgment on the bond in favor of any person but the obligee. The judgment was therefore erroneous and must be reversed, and that of the county court allowed to stand. The county court ought not, perhaps, to have cancelled the bond. But if that were erroneous, it did not concern the present appellant, as he had no interest in the bond, in a legal sense, and had no right to appeal.

PER CURIAM. Judgment reversed.

DOE ON DEMISE OF BENJAMIN C. WILLIAMS v. WILLIAM D. HARRINGTON.

A court of equity has a general jurisdiction to direct the sales of the estates of infants, wherever the purpose, for which the sale is directed, shall be deemed by the court beneficial to the infants.

The decree in such a case cannot be impeached in any other case; neither upon the ground, that a guardian was not appointed by the proper court, nor that there was not due advertisement or competent evidence of it, nor that the interest of the infant was not promoted by the sale, nor that, for any other reason, it was not a proper case for a sale, nor that the decree did not find the facts, which shewed the sale to be beneficial, nor upon any similar grounds.

Where a decree is made, on behalf of infants, for the sale of "the lands of the deceased debtor lying in Moore county," and a sale is made of several specified parcels of land, the sale ratified, and an order of the court to convey to a particular purchaser, no exception can be taken to the general description of the land in the decree ordering the sale.

The court has the power, with the consent of the reported purchaser, to substitute another person in his place; though, as a matter of wholesome practice, such a substitution ought not to be allowed, before the payment of the purchase money, nor, perhaps, without looking to the rights, even of third persons, as against the first purchaser.

Under an order of the court of equity for the sale of the real estate of infants, the deed of the commissioner appointed to make the sale, by virtue of the provisions of the act of 1827, transferred to the purchaser the legal title.

The cases of *Harris* v. *Richardson*, 4 Dev., 279; *Leary* v. *Fletcher*, 1 Ire., 259, and *Jennings* v. *Stratford*, 1 Ire., 404, cited and approved.

Appeal from the Superior Court of Law of MOORE County, at the Fall Term, 1850, his Honor, Judge *Battle*, presiding.

The premises descended from his father to the lessor of the plaintiff, while he was an infant, and the defendant claimed them under a deed to him from the clerk and master of the court of equity for Moore county. The whole question was on the validity of the defendant's title. The deed was made in 1833, and recites, that, at August term, 1831, the court by its decree commanded the clerk and master, after advertisement, to sell certain lands belonging to the estate of Benjamin W. Williams, deceased, and that, by virtue of that decree, after due advertisement according to the decree aforesaid, the clerk and master set up the following tracts of land for sale to the highest bidder on the 29th day of November, 1831, in said county, when Charles Chalmers, John B. Kelly, and Daniel McNeil, became the highest bidders for William D. Harrington, at the price of $1,890, and that the said Harrington had paid the same. In consideration of the premises, the deed then purports to convey to Harrington, the defendant, the premises in fee, describing them by metes and bounds. In support of the deed, evidence was given on the part of the defendant, that, after the year 1835, all the original papers and records of the court of equity for Moore were burnt by accident, including the proceedings on which the recited decree was founded. And evidence was further given by witnesses, that, in 1831, a petition was filed in the court in the name of the lessor of the plaintiff by one Charles Chalmers, as his guardian, which set forth in substance, that Benjamin W. Williams, the father of the lessor, had died seized and possessed of a large real estate and also entitled to a large personal estate; that he died very much indebted, and all the personal estate had been applied towards the debts, and that several large debts remained unsatisfied, among which was a large debt to one Mr. Haskill, on which judgment had been obtained, and the plaintiffs were about to sue out process to subject the

lands of the deceased debtor thereto: that if the lands should be sold for cash under execution, they would probably be sold at a great sacrifice, and that it would be for the interest of the infant heir, as well as beneficial to the creditors, that they should be sold on a reasonable credit under the decree of the court of equity: And the petition prayed that the court would decree a sale of all the lands of the deceased debtor lying in Moore county, upon such terms and in such manner as to the court might seem meet. Evidence was further given by witnesses, that testimony was offered to the court, upon the petition, to show the necessity of the sale, and that the court decreed the sale of the lands set forth in the petition as prayed for, and ordered the clerk and master to make the sale at auction on the premises, on certain terms therein specified, after advertising the same; but the witnesses stated, they were unable to recollect, whether the decree declared the facts upon which it was made. Evidence was further given by the clerk and master, that he duly advertised the sale in a newspaper printed in Fayetteville, according to the decree, and proceeded to sell the lands on the premises, when John B. Kelly became the highest bidder for the tract in controversy in this suit and was declared the purchaser and gave bonds for the purchase money: that he reported the sales to the court of equity, and the court passed an order ratifying them, and directing the clerk and master to convey the lands to the purchasers upon the payment of the purchase money: and that afterwards Kelly paid the purchase money for this tract, and that under his direction and under an order also of the court, he, the clerk and master, then made the deed to the defendant. The witness further stated, that all the proceedings were recorded. The counsel for the plaintiff objected to that part of the evidence respecting the advertisement in the newspaper, without

producing the paper. But the court overruled the objection.

On the part of the plaintiff it was insisted, that Charles Chalmers was not duly appointed guardian os his lessor; and in order to establish that, he gave evidence that his mother died soon after he was born, and afterwards his father resided in Moore county until his death in 1828; and that the lessor of the plaintiff lived with his father up to his death, and was then seven years old; and immediately afterwards he was taken by his maternal grand-father to reside with him at Chapel Hill, and that before he had been in Orange county twelve months, the said Charles (who was the maternal uncle of the lessor) was appointed his guardian by the county court of Orange.

The plaintiff's counsel contended, that the defendant had no title under the deed, on the following grounds: that Chalmers was not duly appointed guardian and therefore had no authority to file the petition; that the court of equity had no power to order the sale of land upon the facts and for the objects set forth in the petition; that the decree did not declare the facts upon which it was founded; that the clerk and master had no authority to convey to the purchaser, and that his deed, therefore, was inoperative; that the defendant was not the purchaser, and therefore the clerk and master had no authority to convey to him, and the deed was inoperative; that the petition and decree ought to have described particularly the lands to be sold, and that they were not sufficiently specified in that respect. But the court held, that neither of the grounds of objection was sufficient to invalidate the defendant's title; and, under directions to that effect, the jury found for the defendant, and the plaintiff appealed.

Strange, *Reid* and *Mendenhall*, for the plaintiff.

Winston, *Sen.*, *Haughton*, *Kelly* and *H. W. Miller*, for the defendant.

RUFFIN, C. J. Most of the objections are untenable in themselves. But without considering them in detail, there are some general considerations, which apply to them all and show that they cannot detract from the defendant's title. It is not necessary to go back further than our own statutes, to find a general jurisdiction vested in the courts of equity of this state to dispose of the land, as well as the chattels, of infants, for their benefit. Those courts were constituted in 1782, with all the powers and authorities of the court of chancery. By the act of 1762, the powers of the court of chancery, as to orphans' estates, are expressly saved. Then, the act of 1827, after reciting that doubts had been entertained, whether any court could direct a sale to be made by guardians of the real and personal estates of their infant wards, except in certain cases specified in two previous acts, and that the best interests of infants sometimes demand that such sales should be made in cases, to which those acts did not extend, enacts, by way of remedy therefor, that on the application of a guardian by bill or petition, setting forth facts, which, if true, shew that the interest of the infant would be materially promoted by the sale of any part of the infant's estate, real or personal, the court of equity shall cause the truth of the facts to be ascertained, and may thereupon decree, that a sale be made by such person, in such way, and on such terms, as the court in its wisdom shall adjudge. Then follow, in the next section, provisions, that the sale shall not be deemed valid, until it shall be ratified by the court; and that the court shall designate the person to make the title to the purchaser, and that no conveyance shall be made until the court shall order it—with a provision also for investing the proceeds of a sale. A jurisdiction over any subject could not be more extensive than that of the court of equity, as confessed or recognized by the statutes quoted. If it were before doubtful, the act of 1827 thus confers upon the

highest equitable tribunal, known to our law, full power to order the sale of the estates of infants, provided only that the court shall think it for the interest of the infant in any way whatever, as to pay debts, for partition, or more convenient management, or to produce greater profit, or any other purposes deemed beneficial by the court. In the exercise of that power the acts of the court are, therefore, not to be regarded as those of a court, not possessing a general jurisdiction over a subject, but only a special one to proceed on a particular subject for certain specified purposes in a particular way. The cases of *Harris* v. *Richardson*, 4 Dev., 279, and *Leary* v. *Fletcher*, 1 Ire., 259, are contrasted examples of the difference between such general and special jurisdictions, touching the very point now under consideration; namely, the powers of the court of equity and the county court to authorize a guardian to sell his ward's personal property, (over which those courts have a general jurisdiction,) and the special authority of the county court to order a sale of the infant's land under the act of 1789. That distinction is further illustrated by the case of *Jennings* v. *Strafford*, 1 Ire., 404; in which also the general rule is recognized, that the judgment or decree of a court, having general jurisdiction over a subject matter, subsisting unreversed, must be respected, and sustains all things done under it, notwithstanding any irregularity in the course of the proceedings, or error in the decision. Supposing, therefore, that there may have been irregularities or even error in the court of equity, still the decree cannot be questioned in a court of law for such causes. It is not for another court to arraign the decree, or the orders confirming the sale and for the conveyance to the defendant, upon such grounds, as that the guardian was not appointed by the proper court, or that there was not due advertisement or competent evidence of it, or that the interest of the infant was not promoted by

the sale of the land, or that for any other reason it was not a proper case for a sale, or that the decree did not find the facts, which shewed the sale to be beneficial. For, all those matters were necessarily the subjects of consideration for the court of equity, and must have been passed on in the cause, before the decree or order could have been made. Having been judicially decided, it cannot be averred, that they were not duly and rightly decided. It would be monstrous, if the title of a purchaser under the decree—who paid his money to the court, and got his deed from the court, as it were—could be impeached upon any such grounds. Therefore, all the objections must fail upon the principles mentioned, unless it be those which insist on intrinsic defects in the decree or orders, as not being in themselves sufficient to authorize a sale of the premises in dispute and the conveyance to the defendant.

The court cannot suppose, that the petition and decree did not describe the land more particularly than "as the lands of the deceased debtor lying in Moore county;" for no respectable counsel would draw pleadings, nor the court decree in such terms. It was probably thus stated by the witness, because, after the destruction of the papers, they were unable to repeat the particular words, or do more than give the substance. But, if it were otherwise, the decree, though less precise than usual, would not be so very vague as to be ineffectual, when taken in connection with the subsequent proceedings. It would then be as particular as a *fieri facias* on a judgment against heirs, which runs against the lands descended from the debtor; and they are identified by the sale and sheriff's deed. Here any defect, as to the certainty of the land, is cured by the report of the master of the sales of the several parcels, and their ratification, and the order of the court to the master to convey this particular tract to the defendant. So it appears, that there could not be

a mistake as to the identity of the land intended and ordered to be sold, and that actually sold.

Cases were cited at the bar, in which the court of equity has refused to allow another person to be substituted for the purchaser reported; and it was thence inferred, that the deed was not properly made to the defendant. Those cases seem to have been all proper, and this court agrees, that, as a matter of wholesome practice, such a substitution ought not to be allowed before the payment of the purchase money, nor, perhaps, without looking to the rights, even, of third persons as against the first purchaser; which is the whole extent of those cases. But although under those circumstances it may be against the course of the court of equity to discharge one bidder and take another, yet there is nothing in those cases intimating the idea of a defect of power to do so. In this instance it was done by the express leave of the court, after the payment of the whole price, and an order was made for a conveyance to the substitute; and that is conclusive.

It is competent to the legislature to direct the mode of transferring the legal title upon a judicial sale under a decree, as it is on one under execution at law. It was very meet that some mode should be provided, as the decree itself only constituted an equitable title, and conveyances could not commonly be got from the owners by reason of their disability. It is at present the province of the clerk and master *virtute officii*. But at the period of this transaction it was not. The act of 1827, however, is express, that a conveyance shall be made to the purchaser, when the court shall order it, and by the person who shall be designated by the court. It is certain, then, that the estate at law was intended to be transferred by a deed, to be executed under the direction of the court; and, in this case, the deed was thus executed, and, consequently, it passed the title to the defendant.

PER CURIAM. Judgment affirmed.

WILLIAM H. WILLARD v. PATSEY BLOUNT.

In this state, land is taxed according to its fee simple value, and whoever is owner of the land for the time being is bound to pay the tax: as if an estate is limited to A. for life or for ten years, remainder to B. and his heirs, the valuation is assessed, without reference to this division, and each must pay the tax, during the time that he is the owner and enjoys the possession and pernancy of the profits.

It is otherwise in the case of landlord and tenant, *where rent is reserved*, for the rent is in lieu of the land, and the landlord is *in pernancy of the profits of the land:* and if the tenant is compelled to pay the tax, he may recover from the landlord, or deduct the amount out of the rent.

Appeal from the Superior Court of Law of BEAUFORT County, at a Special Term in January, 1850, his Honor, Judge *Battle*, presiding.

No counsel for the plaintiff.
Donnell and *Rodman*, for the defendant.

PEARSON, J. In September, 1846, the defendant leased to one Watson a lot, at the corner of Water and Market streets in the town of Washington, 22 feet on water and 50 feet on Market street, for the term of ten years, to begin on the 1st of January, 1847, *free of rent*, in consideration, that the said Watson would erect on said lot a building according to specifications, and deliver the said building to the defendant, her heirs or assigns, at the end of the term in good repair, natural decay alone excepted; and the said Watson covenanted for himself, and his assigns,

that, after the erection of the said building, it should be at all times insured at a valuation of not less than $2,000 against loss or damage by fire, for the benefit of all persons having estates therein, with a condition of re-entry, in case the covenants were not complied with.

In April, 1847, Watson assigned his lease to the plaintiff, in consideration of $2,050, Watson binding himself to erect the building according to his covenant with the defendant.

Afterwards taxes became payable by virtue of an assessment, authorized by an act of the legislature, passed at its session in 1846–47. These taxes, amounting to $13.20, were paid on a threat of distress, and under protest by the plaintiff, who demanded of the defendant the amount so paid, and, upon refusal, commenced this suit by warrant.

His Honor was of opinion, that the plaintiff was not entitled to recover. In this we concur.

By the revised statutes, ch. 102, sec. 1, it is provided, that a tax of six cents on *every hundred dollars thereof*, shall be annually levied and collected from all real property, with the improvements thereon.

By the 2nd section, all real estate held by deed, grant, or lease, or by title of dower, curtesy or otherwise, shall be subject to the payment of public taxes, except land of the University, houses set apart for divine worship, &c.

Land, then, is taxed according to its fee simple value, and whoever is owner of the land for the time being is bound to pay the tax. If the estate is divided by giving a particular estate to one—the remainder to another—as, if an estate is limited to A. for life or for ten years, remainder to B. and his heirs, the valuation is assessed without reference to this division, and each must pay the tax, during the time he is the owner and enjoys the possession and pernancy of the profits. According to this general proposition, the plaintiff, being the owner for the time

being, and enjoying the possession and pernancy of the profits, is bound to pay the tax.

The case of the landlord and tenant forms an exception, *where rent is reserved;* for, the rent is in lieu of the land, and the landlord is in the *pernancy of the profits of the land*, the profit of the tenant being the fruit of his own labor. Hence, in such cases, the landlord is bound to pay the tax, and if the tenant be compelled to pay, he may recover from the landlord or may deduct the amount out of the rent. But in the case under consideration, no rent is reserved. The defendant receives nothing in lieu of the land, and the entire profits are enjoyed by the plaintiff. He, then, does not come within the reason for making the case of ordinary tenants paying rent an exception to the general rule.

Let us see how it operates. A vacant lot, worth say $200, is leased for ten years without rent—a building, worth say $2,000, is erected upon it. The lessee enjoys the entire use and profits of the lot in its improved condition. The amount of the assessment, and, of course, the tax is increased ten times. It is right, that the lessee, who has the whole profit, should pay the tax; for, in fact, the lessor has parted with his entire estate for the ten years and stands as a *remainder man*, and not as a landlord receiving rent.

It is said, the lessor will be benefited by receiving the property in its improved condition at the end of the term. That is true, and then he will be bound to pay the tax; but, in the meantime, it is manifestly unjust to require the lessor to pay tax for what he has never enjoyed; and there is no mode of apportioning the tax, so as to shew what ought to be paid for and on account of the original value, and what for the additional value; and upon the general rule, the plaintiff is bound to pay the tax.

The English cases give no aid in deciding this question, because the land in that country is assessed upon the

annual rent, and if it be not rented, upon such sum as it could reasonably be rented for, and the statute provides, that, in case tenants are compelled to pay the tax, they shall have the right to deduct it out of the rent. 38th Geo. 3.

PER CURIAM. Judgment reversed.

JAMES SLOAN, Adm'r v. CYRUS STANLY, et al.

Where an execution is about to be levied by a constable, the debtor, if he has personal property, must shew it, and, if he does not, the officer commits no wrong by levying on the land in the first instance.

So, if it does not appear that the officer knew of the existence of the personal property, he is justifiable in levying on the real estate.

If an interlineation appears on the face of an officer's return, and there is no evidence to shew when it was done, the court will presume that it was done before the return was made, when the officer had authority to alter his return.

Appeal from the Superior court of Law of GUILFORD County, at a Special Term in July, 1850, his Honor, Judge *Dick*, presiding.

This case was submitted to the court on the following facts:

On the 4th day of August, 1848, Aaron Mendenhall, as executor of Moses Mendenhall, dec'd, sued out four different warrants against one Israel Stanly, which were all returned before a magistrate, and judgment granted on the 8th day of September, 1848, amounting in all to about

the sum of four hundred and fifty dollars ($450). Executions were issued on the same day, and levied on two tracts of land, and the levies were returned to November term, 1848, of Guilford county court. After the levies aforesaid, and before November term, 1848, Israel Stanly, the defendant, died. At February term, 1849, the heirs-at-law of said Stanly were made parties defendants. At February term, the court ordered the lands to be sold, and *venditioni exponas* to be issued, from which order the heirs of Israel Stanly appealed to the superior court.

After the cases aforesaid were in the superior court Aaron Mendenhall died, and administration *de bonis non*, on the estate of Moses Mendenhall, was granted to James Sloan, the present plaintiff. In the superior court, the plaintiff moved for a confirmation of the order of the county court, which motion was opposed by the defendants: 1st. Because the judgments were void, having been, as the defendants alleged, entered up more than thirty days after the date of the warrants. 2ndly. Because the defendant had personal property, which ought to have been levied on, instead of the land. 3rdly. Because the levies were fraudulent, and were interlined by the constable, after they had been returned to court.

As to the first objection made by the defendants, the court was of opinion that the first levy, if made on the 8th day of September, as it purported to be, was good, for by excluding the 4th of August, the day of the levy, and excluding five Sundays, the 8th of September would be the 30th day. As to the second objection, it appeared in evidence, that, at the date of the levy, Israel Stanly had personal property to the amount of $350, or more, but it was admitted by the defendant's counsel, that he had not personal property, to discharge the whole of the said judgments, and there was no evidence tending to prove, that the constable was requested by Stanly, to levy on the

personal property, or that the constable knew of the existence of the personal property. It was also proved and admitted that Israel Stanly, on the 28th of September, 1848, conveyed the whole of his personal property in trust, to secure other creditors.

As to the second objection, the court was of opinion, that the constable was authorized to levy on the land, because the personal property was not sufficient to discharge the four judgments, and therefore the levies were not void.

As to the third objection, it appeared by inspection of the levies, that the words, "goods and chattels," were interlined in each of the four levies, in a different colored ink. The clerk of the county court was examined; he stated, that he could not say whether the levies were now different, from what they were when they were first returned to his office: that after the papers were first returned to his office, the constable once or twice (by the consent of the clerk,) took the papers to counsel, and returned them again to the office. The defendants then proved by a witness, that on the day Israel Stanly was buried, he, the witness, informed the constable of his death. The constable remarked that he ought to have been there, and levied before his death. The court, being of opinion that the defendants failed to prove that the levies were interlined after they had been returned to court, and had also failed to prove that the levies were made after the death of Stanly, therefore ordered and adjudged, that the order of sale made by the county court be confirmed, and that a *procedendo* issue to the county court; from which orders, the defendants prayed for and obtained an appeal to the Supreme Court.

Morehead and *Miller*, for the plaintiff.
No counsel for the defendants.

NASH, J. We have examined the exceptions filed against the opinion of the judge, who tried the cause, and concur with him in his judgment. The first objection is founded, we presume, upon the 7th section of the act of 1836. *It* directs, that "all warrants issued by a justice of the peace shall be made returnable on or before thirty days from the date thereof, Sundays excepted, and not after," &c. The warrant in this case literally complies with the act. It is directed "to any lawful officer to execute and return within thirty days, Sundays excepted." The exception is, that the judgment is void, because it was rendered or entered up more than thirty days after the date of the warrant. Looking to the substance, and not simply to the language, and the objection is, that the warrant was returned after the expiration of the time designated in the act, and the judgment was then rendered. The warrant was dated on the 4th of August, 1848, which was Friday, and the judgment obtained on the 8th of September. Supposing, that a judgment obtained before a magistrate, on a warrant returned after the thirty days, as stated in the act, be void, the question does not arise here; because, by allowing the four Sundays in August and the one in September, the warrant was returned on the 30th day.

The second objection is that the defendant in the execution had personal property, which ought to have been levied on, and not the land. The case shows, that, at the time the judgment in this case was obtained, three others were given against the present defendant in favor of this plaintiff, amounting in the whole to $150. Executions were issued upon all of them, at the same time, and all placed in the hands of the same officer; and all of them were levied at the same time. The defendant in the executions had personal property, but not to an amount sufficient to satisfy them. The personal property was not shewn to the officer, nor did he know of its existence.

The act of 1836, Rev. Stat., ch. 62, sec. 16, expressly recognizes the personal property of a debtor as the primary fund for the satisfaction of a justice's execution; nor is the officer at liberty to levy it on the land, but when no goods and chattels are to be found, or not a sufficiency to discharge it. This provision is for the benefit of the debtor, and when an officer is about to make a levy, if the debtor has personal property and wishes to save his land, he must show it. If he does not, the officer commits no wrong by levying on the land in the first instance. The fact, however, disclosed by the case, that the officer did not know of the existence of the personal property, or what is the same thing, that there was no evidence to prove that he did know it, is decisive of this objection—he could not levy on that, of whose existence he had no knowledge. Moreover, no possible injury could arise to the defendant in the execution or to his heirs, as the former had, before the return of the execution, conveyed away, by a deed of trust, all his personal property to secure debts of a greater amount than it was worth.

The third exception is, that the levy was fraudulent and interlined after it came to court. The fraud consisted in the alleged fact, that, after the levy had been returned to court, the officer had altered his return by interlining the words "for the want of goods and chattels." There is nothing in the case to shew, when those words were interlined, whether before or after the return of the levy. The constable is an officer, whose official returns are made on oath; and, as, before he makes his return, he may alter it any manner he pleases, so as to present the truth, we are bound in common charity and justice to presume in this case, the alteration was made at the time when he could legally make it.

In what the fraud consists, of which the defendant complains, beyond the interlineation, we are not positively informed. We gather, however, from the close of the judge's opinion, that it was in the alleged fact, that the levy was made, after and not before, the death of Israel Stanly, the father of the defendants, and against whom the judgment was obtained. The case discloses no evidence, shewing that the levy was ante-dated.

We concur with his Honor in the view, which he took of the case, and that there is no error in the proceedings in the county court. The judgment is affirmed; and a *procedendo* will issue to the county court of Guilford.

PER CURIAM. Judgment accordingly.

NOTE.—There were three other cases, at this term, between the same parties, in which the same judgment was rendered.

JOSEPH BYNUM, et al. v. MARK BYNUM, et al.

Although it be not error to refrain from giving instructions, unless they be asked for; yet the Judge, when he does give instructions, either of his own motion or at the party's, should give them in such a way, that they be not in themselves erroneous, or so framed as to mislead the jury.

In order to satisfy that part of the law, which requires the attestation of subscribing witnesses to a will to be *in the presence* of the testator, it is sufficient if the attestation be in the same room in which he is, provided it be not done in a clandestine, fraudulent way, which would not be in the party's presence.

Where two persons agree to make mutual wills, *it would seem*, that bad faith in the one, either in not making his will or in cancelling it after it was made, will not prevent the probate of the will of the other party.

Appeal from the Superior Court of Law of Randolph County, at the Spring Term, 1850, his Honor, Judge *Battle*, presiding.

BYNUM *v.* BYNUM.

This is an issue of *devisavit vel non*, upon a script alleged to be the last will and testament of Martha Ward, deceased. It bears date July 13, 1833, and has two subscribing witnesses, W. J. Fuller and W. Gates; and it gives to Nathaniel Ward, one of the brothers of Martha, her half of a tract of land, on which they lived, containing 670 acres, eight slaves, a bed and furniture, and all her other property. She died in 1834, and Nathaniel Ward then obtained probate in common form. But in 1848, some of the next of kin and heirs, who were infants at the probate, obtained an order for re-probate, under which the present issue was made up.

Evidence was given, that Martha Ward and her brother Nathaniel, (neither of whom had ever been married,) lived together for many years and worked their property in common; and that there was some agreement between them, that the longest liver should have the whole. At the date of the paper she was about sixty years of age. Fuller, one of the subscribing witnesses, deposed, that Martha Ward had mentioned to him, that she wished him to do some business for her, and that some time afterwards Nathaniel came for him and said, that he wanted him to go and do some business for him and his sister Martha: that he went to their house, and at the request of Nathaniel he then wrote his will, giving all his property to Martha: that he thought, but was not certain, Nathaniel then requested him to keep his will: that Martha Ward was very sick and in bed, and that he then prepared a table near the head of the bed, in which she was lying, and there wrote her will: that Nathaniel was present, when Martha made her will, and assisted in giving him the names of her negroes: that, after he had finished the writing, he read it over to her, and she was raised up in bed and signed it, and then laid down again, and he and Gates subscribed it, as witnesses, at the table, at which it had been written, which was about two or three

feet from the bed: that she could see the table and the witnesses, while they were subscribing, but that he was not certain, from the position in which she was lying and of his arm, while he subscribed, that she could see the paper at that time: and that he thought another paper might have been substituted for that she signed, without her knowing it: that Nathaniel then left the house, and Martha exclaimed, "Oh! sisters Betsy and Polly," and began to weep: that, as he was leaving the place, after doing the business, he saw Nathaniel in the yard, and he asked him for his will and he gave it to him, and never saw it afterwards, though he had several times looked over the valuable papers in Nathaniel's pocketbook: that he kept Martha Ward's will until her death: and that she had capacity to make a will. The other witness, Gates, deposed, that he was present when Fuller wrote the script, and that it was written at a table within two or three feet of the head of the bed, in which Martha Ward was lying, very sick: that she was raised up, and Fuller held her hand while she signed the paper, and that Fuller and he then signed as subscribing witnesses at the same table: that, while they did so, Martha could see them, but he was not certain that, from the position in which she lay, and of his arm, she could then see the paper, and he thought another might have been substituted without her knowing it: and that, though very sick, she had sufficient testamentary capacity.

Another witness deposed, that, one or two years after Martha's death, he saw, in Nathaniel's possession, a paper purporting to be a will, with two subscribing witnesses, one of whom was the said Fuller, and the other he could not recollect: and that Nathaniel took it up, and spoke of his sister Martha, and wept.

The court instructed the jury, that, as to the formal execution of the script, it was not necessary it should be proved, that the party deceased actually saw the

paper at the time it was subscribed by the witnesses; but it was necessary she should be in such a situation, that she could see it, if she wished; and that, if the jury believed she could not see it at that time, it was not subscribed in her presence, within the meaning of the law. And the court further instructed the jury, that, if Nathaniel Ward induced his sister Martha to make a will in his favor by making his in her favor, and intended at the time to destroy his as soon as he obtained hers, and he did destroy it in her lifetime, it would be such a fraud in procuring the script as rendered it a nullity.

The jury found against the script altogether. The propounder then moved for a *venire de novo*, because the script, according to the evidence, was so subscribed in the presence of the party as to made it a good will to pass the real estate, and, at all events, it was sufficient to pass the personalty; and because there was no evidence to be left to the jury, that there was any such fraud as that supposed in obtaining the script, and that, if there were, it would not invalidate it as a will. The court refused the motion, and stated, as a reason for doing so in respect to the paper as a testament, that, though the counsel for the propounder insisted in general terms before the jury, that the script was properly executed, and read it throughout, yet he did not particularly call the attention of the court to the date, nor to the distinction between its execution as a will disposing of realty and personalty.

Miller, *McRae* and *Kelly*, for the plaintiffs.

Haughton, *Mendenhall* and *W. H. Haywood*, for the defendants.

RUFFIN, C. J. As the paper was executed before 1840, attestation was not necessary to its validity as a will of personalty; and probably the presiding judge would not have allowed a mistake of that kind—arising from a mere

slip of his memory or attention—to prejudice the party, and would have granted a new trial, but for the desire to have the litigation put into a way to be terminated by having the other points decided. The Court thinks, however, that the propounder could not only ask for a new trial, but he is entitled to a *venire de novo*, for error in that part of the instructions. The propounding of the script, as disposing of both kinds of property, and reading it through to the court and jury, and insisting in the argument that it was well executed to all the purposes involved in the issue, it would seem, sufficiently presented the distinction between the execution of wills and testaments, in 1833, to make it incumbent on the court to inform the jury of the distinction, if the judge undertook to give any instructions at all on the points of attestation and execution. Although it be not error to refrain from giving instructions, unless they be asked, yet care must be taken, when the judge thinks it proper, of his own motion or at the party's, to give them, that they be not in themselves erroneous, or so framed as to mislead the jury. Such care was not taken here; for the instruction given, unaccompanied by any qualification or explanation, may have left, and probably did leave, the jury under the impression, that attestation in the presence of the party was requisite to give validity to the paper for any purpose, and may have prevented it from being sustained as a testament.

But, upon other points, the Court also deems the directions erroneous, considered in reference to the evidence, on which they were given. It is true, the terms, "in the presence," and "within view," are considered generally synonymous; because the sight of the testator is the best means of preventing the fraud, within the province of the act. But they are not perfectly so; for a blind man may make a will. Besides, as the court here said, actual view is never necessary, but it is sufficient if

the party might see the witness attest, though in a different as well as in the same room. For, if actual sight were requisite, it would vitiate a will, as was mentioned in *Sheers* v. *Glasscock*, 1 Salk., 688, if a man did but turn his back or look off, though literally present by being at the spot where the thing was done. But when the witnesses attested in the same room in which the testator was lying in bed, it was good, though the curtains of the bed were closed; because it was in his power to see them, and therefore it was construed to be done in his presence. *Davy & Nicholas* v. *Smith*, 1 Salk., 395. It is not, therefore, the feasibility of obtaining another paper, which will avoid the attestation, when all passes in the same room, so that the party has opportunity of watching for him or herself; for under those circumstances the attestation is *prima facie* good. It is true, it is not to be taken to be conclusively good. The Chancellor in *Longford* v. *Eyre*, 1 Pr. Wms., 740, stated, that the bare subscribing by the witnesses in the same room did not necessarily imply it to be in the testator's presence; for it might be in a corner of the room in a clandestine, fraudulent way, which would not be in the party's presence. Yet in that case it was held, the attestation by the witness in the same room, by the request of the party, could not be fraudulent and was sufficient. Those cases seem to be full authorities for holding, that this attestation, being done openly and without any clandestine appearance about it, but in the same room with the testatrix and within two or three feet of her, when she had her senses and nothing intervened between her and the witnesses, is good under the statute. It was done both literally and substantially in her presence: which is the safeguard provided by the law, and must be enough, though it may not exclude all possible chance of imposition.

The Court is not prepared to adopt the proposition, respecting the supposed fraud of the brother in procuring

this will and then destroying his own. No case is found like it. There was no misrepresentation of any matter of fact then passed or supposed to be existing. If it be supposed there was an agreement for mutual wills, it is not seen how the validity of the sister's will could be impeached upon the bad faith of the brother in cancelling his. If the agreement was in a form to render it valid, its performance could be enforced specifically by the sister had she survived. But she died first, and the destruction of the brother's will became immaterial, because it could not have operated, if it had not been destroyed. If there was no valid contract between them, then each knew that the intended bounty by will depended upon the pleasure of the other in revoking or not revoking his or her will. So that, looking at it in any light, it is not seen, how the supposed conduct of the brother could have rendered the sister's will a nullity, supposing it to be in other respects valid; as the preservation of her will would only argue, that she meant to carry out her engagement in good faith at all events, or that she had not changed her mind as to the object of her bounty. But there may, possibly, be more in it than strikes one at the first blush, and, as its decision is not necessary to the determination of this case, the Court declines the decision of it. For, supposing the law to be as laid down to the jury, there was not evidence, as we conceive, to the facts necessary to raise the point. It was but a remote inference from the evidence, that the sister, then aged and supposed to be *in extremis*, was induced to make her will in consideration of one in her favor by the brother. But admit that she may have been, there is no evidence that the brother contemplated, at the time, the destruction of his, nor that he did destroy it in her lifetime. His omission to produce it on the trial, fourteen years after her death, (which rendered it nugatory by the lapsing of the gifts,) can authorize no inference against him. Of course, no reliance is placed

on the testimony of the witness, who speaks of seeing a will in Nathaniel's possession a year or more after Martha's death; because, as stated, he does not speak of it as purporting to be the will of the brother or of the sister, nor whether he knew the handwriting to the signatures, nor whether the paper was a copy or original. Indeed, that is evidence on the other side; whereas this question depends upon the defect of proof, by the caveators, of the fraud, which they allege and must establish. They offered no evidence to it but that of Fuller, and that is entirely deficient. He was under an impression, though not certain, that when Nathaniel executed his will he asked him to keep it—whether in the presence or with the knowledge of the sister, he does not intimate; and he said, that, as he was leaving the house, Nathaniel got the will from him, and he never saw it afterwards, though he had examined the valuable papers in Nathaniel's pocketbook. It is singular, if any such understanding existed as to mutual wills to be kept by the witness, as is supposed, that such an immediate violation of it should not have made a permanent impression on the witness, and, indeed, that he had not communicated it to the sister. But, overlooking that, the observation is obvious, that the witness does not state that Nathaniel kept all his valuable papers in his pocketbook, or that he professed to submit all of them to his examination, or, especially, that such examination occurred during Martha's life, which is the essential point. There is, in truth, nothing relevant to this matter, but a vague impression on the mind of the witness, that Nathaniel asked him to keep his will, and subsequently, on the same day, he took it into his own keeping; which affords no clue to an existing intention to destroy it, or to its actual destruction then, or at any time in his sister's lifetime. The case was, therefore, left to the jury to draw an

inference of fraud against the party without any evidence, that could in law or reason sustain the imputation.

PER CURIAM. Judgment reversed and a *venire de novo*.

SOLOMON HEATHCOCK v. NELSON PENNINGTON.

The degree of care to be taken of a hired slave does not differ from that required as to other things.

It is erroneous to leave the question of due care to the jury; since it is the province and duty of the court to advise them on that point, supposing them to be satisfied of certain facts.

Ordinary care is that degree of it, which, in the same circumstances, a person of ordinary prudence would take of the particular thing, were it his own; and it will differ much, according to the nature of the thing, the purpose for which it was hired, and the particular circumstances of risk, under which a loss occurred.

If an owner hire out his slave for a particular purpose, it is to be understood he is fit for it, and, therefore, he may be set to that service, and kept at it, in the way that is usual. If there be risks in such service, it is to be presumed the owner must have foreseen them, and provided for them in the hire.

The case of *Biles* v. *Holmes*, 11 Ire., 16, cited and approved.

Appeal from the Superior Court of Law of STANLY County, at the Spring Term, 1850, his Honor, Judge *Settle*, presiding.

The declaration states that the plaintiff hired to the defendant a negro slave between the ages of ten and twelve years, for the term of one year from, &c., with permission to the defendant to employ the slave in

driving a horse attached to a whim, at a certain gold mine, belonging to the defendant, and that the defendant undertook and promised the plaintiff to take ordinary care of the said slave during the term; and that the defendant, not regarding his understanding aforesaid, wholly neglected and refused to take ordinary care of the said slave, and, by means of the negligence and improper conduct of the defendant, the said slave, while in the employment aforesaid, under the defendant during the term and year aforesaid, viz, on, &c., fell into the shaft of the said gold mine, the same being 160 feet deep, and was killed and wholly lost to the plaintiff to the damages, &c. Plea, not guilty.

On the trial the plaintiffs gave evidence of the hiring, as stated in the declaration, and that the negro was of the age specified: that on a day in the month of January, the slave was put to driving the horse to the whim of the defendant's gold mine, at about 9 o'clock in the evening, with orders to continue the driving through the night until the next morning, under the directions of a young man, who was about 19 years of age and was employed as lander, as he is called, at the mouth of the mine or shaft. That the whim was about ten feet from the mouth of the shaft or pit, which was 160 feet deep, and at the surface 8 feet long, and 4 feet wide. That the negro boy did not have an overcoat, but was allowed to warm himself at a fire, which was kept up about 2½ feet from the mouth of the shaft: that upon one occasion, when he went to warm, which was just before daylight in the morning, and when it was dark, the lander called to him and directed him to start his horse, and the boy, being drowsy, in attempting to go to his horse fell into the pit and was killed.

The defendant then offered evidence, that he employed a negro boy of his own, and his son, who were about the same age with the hired boy, in the same service to which

the plaintiff's slave was put; which was objected to on the part of the plaintiff, but admitted by the court.

His Honor, therefore, charged the jury, that the defendant was bound to ordinary care of the hired boy: that his having employed his own son and slave in the same way with the plaintiff's negro was not a rule or standard, by which they should measure the care the defendants ought to have taken of the plaintiff's slave; because, if he did not take due care of his own family and property, that was no reason why he should not be chargeable for want of taking care of the slave he had hired. The court then left it to the jury to say, whether the defendant had used ordinary care or not. There was a verdict for the defendant, and from the judgment the plaintiff appealed.

Strange, for the plaintiff.

Dargan, for the defendant.

RUFFIN, C. J. The degree of care to be taken of a hired slave does not differ from that required as to other things; and it was correctly so held on the trial. Indeed, the declaration lays the defendant's undertaking to be for ordinary care of the slave, and that the loss arose from the want of due care. It was, however, erroneous to leave the question of due care to the jury; since it is the province and duty of the court to advise them on that point, supposing them to be satisfied of certain facts. *Biles* v. *Holmes*, 11 Ired., 16. Therefore the judgment would be reversed, if the verdict did not appear to be what it ought to have been, if the court had given the proper direction. For, supposing all the evidences to be true—and as to that, there was no dispute—it did not establish, we think, a want of due care in the defendant. The jury therefore judged rightly, and their decision ought not to be disturbed.

Ordinary care is that degree of it, which in the same circumstances a person of ordinary prudence would take of the particular thing, were it his own. It is manifest, that it may differ very much according to the nature of the thing, the purpose for which it was hired, and the particular circumstances of risk, under which a loss occurred; a coach, for example, is not kept like a casket of jewels. So, a slave, being a moral and intelligent being, is usually as capable of self preservation as other persons. Hence, the same constant oversight and control are not requisite for his preservation, as for that of a lifeless thing, or of an irrational animal. Again, if an owner let his slave for a particular purpose, it is to be understood that he is fit for it; and therefore he may be set to that service and kept at it in the way that is usual. If he hire him, for instance, as a mariner upon a sea voyage, it is implied that he is to do the duty of a sailor. The ship's master, therefore, does the owner no wrong and evinces no want of due care by sending him for a useful purpose to the mast-head, though it happen that from want of experience or a steady head, he fall and be hurt. If, indeed, he were sent aloft in a tempest and forbidden to use the common means of security by lashing himself to the mast or rigging, that would make a difference. But surely the omission to give the slave particular instructions to use those ordinary means of preservation could not render the bailee liable, as for culpable neglect; since every one would confide in his understanding and disposition to take care of himself, as a sufficient guaranty for his using the ordinary precautions against the danger, naturally incident to the service. Moreover, the owner must have foreseen those risks and provided for them in the hire. These considerations tend to the conclusion, that the defendant here would not be liable, if the loss had arisen from a cause naturally connected with the employment, for which the slave was hired. For, it seems certain, that the plaint-

tiff knew, that the whim, at which his slave was to work, must be within a few feet of the mouth of the shaft, and, from the depth of the shaft, that the operations of drawing off the water and raising the ore must go on night and day, and, of course, that the mouth of the shaft would not at any time be closed. The hazards of working near the open shaft, and in the night as well as the day, were the known hazards of the service. Why did not the plaintiff warn the boy of his perils from those causes? Because he did not conceive, there was the least necessity; and he ought not to complain, that the defendant omitted directions, which he thought unnecessary from himself. Unless the defendant, then, exposed the boy at an unreasonable time, or kept him at work for an unreasonable period, and the loss arose therefrom, he cannot be deemed negligent. It is stated, that the boy had no overcoat. But the state of the weather is not given; nor is it stated, that he was not otherwise sufficiently clad. Indeed, his condition in that respect is not pretended to have been the cause of his death, or connected with it, saving only that he may have been thereby induced to go oftener to the fire, and it happened upon the final occasion, when he went there, that he fell into the shaft. But admit that the boy would not have met with the fate he did, but for going to the fire, or if the fire had been in a different situation, yet it cannot be deemed gross negligence not to forbid the boy to go to the fire where it was, or not to have one in a different situation. The fire was between the boy and the lander, whose station is at the mouth of the shaft; and it is not stated that such was not its usual position, or that it was not a proper one. Apparently it was the most proper. It was there equally convenient to the lander and the driver of the horse: and in fact, it was, by its light, a better protection to the slave against accidentally stumbling into the shaft, as he passed near its mouth at every round on which he followed the horse,

than if it had been in a different direction. There was no such extraordinary hazard to the boys, who worked the whim, in going to the fire where it was, as to have induced the defendant to forbid them or to use any uncommon precautions, or give any particular instructions; for example, to keep that fire so as to give a light, or to make the fire in another place. It could not have been anticipated, that the boy was running any risk of falling into the shaft, which his own intelligence, at his age, would not prompt and enable him to avoid, considering him, as we must, as possessing the ordinary degree of intelligence and instinct of self preservation of persons of his age and class. Then as to the time of making the boy perform this service—that is, at night. As has been observed, it is to be inferred that the work could not be stopped during any part of the twenty-four hours, without much loss; and that, in fact, it was the course of the business to keep at work. It is in that point of view, that the evidence, as to the employment of other hands in the same service and for the night as well as the day, was relevant and proper: not as excusing gross neglect as to one by a similar neglect as to others, but as establishing the usual and necessary duties of the employment, and as tending to establish the safety, with which it was attended, when pursued by others of no more years or discretion than this lad, without any particular supervision. Some one had necessarily to perform this service at those times. Therefore it was not unreasonable, *prima facie*. It is not to be collected from the case, that the slave had been worn down by labour so protracted, as would ordinarily overcome persons of his age and condition by fatigue and heavy drowsiness, so as to deprive them of consciousness and the power of self-control. On the contrary, we understand that this boy took his rest through the day, as it is stated, that in the evening he commenced his duty for the night—there being three of them, who performed the task among them,

and probably by turns. We cannot say that was unreasonable; at least, not so, in its bearing on the point now under consideration, namely, as ordinarily disqualifying a boy like this for taking care of his life by avoiding the shaft, as with his senses about him he would do, and thereby making it incumbent on a bailee, as an act of ordinary care, to stop him from work, or appoint a superintendent to keep him away from the shaft. If the defendant had, for example, sent the boy down the shaft, considering his inexperience and timidity, it would, doubtless, have been gross negligence not to provide against the accident of his falling, by making him fast to the bucket or chain. But with common bodily vigor and ordinary intelligence the boy was capable, after the repose of the day, of doing his business on the surface of the ground for the night, though near the shaft, without any probable hazard of getting into it; and, in the same degree, the vigilance of the defendant over his safety might be relaxed, without exposing him to the imputation of negligence, much less gross negligence. The truth is, the event could not have been reasonably apprehended, and was not likely to result from the service, nor had any natural connection with it. No one could suppose, that the boy, knowing the place and its dangers, would incur the risk of stumbling into the shaft by not keeping wide awake. It was his misfortune to resemble the soldier sleeping at his post, who pays the penalty by being surprised and put to death. The event is to be attributed to one of those mischances, to which all are more or less exposed, and not, in particular, to the want of care by the defendant.

PER CURIAM. Judgment affirmed.

THE STATE v. JOHN JOHNSON.

Where a charter has been granted for a turnpike road and the road opened the county court has no right to convert it into a public road, unless the charter has been duly surrendered, or, from a *non-user* for twenty years, a dedication to the public may be presumed.

Even in such case the road can only be made a public road in the manner prescribed by the act of assembly. The mere appointment of an overseer will not be sufficient for that purpose.

The case of *Wilson* v. *Baker*, 3 Ire., 168, cited and approved.

Appeal from the Superior Court of Law of YANCEY County, at the Spring Term, 1850, his Honor, Judge *Battle*, presiding.

The defendant was indicted as an overseer of a public road for not keeping the same in repair.

Upon the trial, the jury found the following special verdict:

That there is a public road, leading from the county of Burke through the county of Yancey to the Tennessee line, and that the same has been used by the citizens for the space of nineteen years, that said road was made by Isaac T. Avery, in 1829, by virtue of a charter granted him by the legislature of North Carolina in 1827 and '28, which charter authorized said Avery to erect toll gates on said road when completed, and exact toll from persons traveling the same: that gates were put up and tolls collected for the first four years, but for twelve years past, the gates have been removed and no tolls taken: that the said Avery was willing and desirous to surrender said road to the county, it being an expense to him, and wished overseers

appointed by the county court for the purpose of keeping the same in repair : that application was made to the county court by citizens of the county, to appoint overseers over said road : that overseers were appointed accordingly and hands allowed to work said road : that the present defendant was appointed overseer over part of said road, a distance of about six miles : that the land over which the said road passes, belongs to the said Avery : that his hands, together with other persons, were alloted by the court, to work under the defendant as overseer : that the said Avery acquiesced in the said appointment and allotment of hands, and his hands worked under the said defendant as overseer by the consent and approbation of the said Avery : that a part of the said road, leading from Burke county to the Tennessee line, passed over land belonging to other persons : that the defendant was duly notified of his appointment : that he has failed to keep the said road, over which he is overseer, in good repair, but suffered the same to become runious, miry, and in great decay, for want of due reparation and amendment. But whether upon the whole matter aforesaid the said John Johnson be guilty of the misdemeanor in said indictment specified and charged upon him, the said jurors are ignorant, and pray the advice of the court thereupon, and if, upon the whole matter aforesaid, it shall appear to the court, that he is guilty of the misdemeanor, in manner and form as charged in the bill of indictment, the jury find him guilty—otherwise, not guilty. The court being of opinion against the defendant, it was ordered and adjudged, that he pay a fine of five dollars. With which judgment the defendant being dissatisfied, prayed an appeal to the Supreme Court, which is granted.

Attorney General, for the State.
Avery, for the defendant.

PEARSON, J. *Baker* v. *Wilson*, 3 Ire., 168, settles this case. There, certain engineers, in the service of the United States, had surveyed and marked out the line of a road, contemplated to be made by the Federal government. The government abandoned the road, and the county court of Yancey, availing itself of the survey and location which had been made, passed an order that the plaintiff, Baker, oversee the road, from the top of the mountain, &c., and assigned hands; among others the defendant, who refused to work, and was warranted for the penalty. The court decided in his favor, on the ground, that the road had not been established according to law, a common public highway, which the inhabitants were bound to keep up. "GASTON J. Our laws are explicit in requiring no new road shall be laid out, but by a judgment of the court upon notice, and a petition filed, and allows an appeal by any person dissatisfied with the judgment. Rev. St., ch. 104, and secs. 2 and 3. These provisions would be substantially annulled, if the mere appointment of an overseer and assignment of hands to a supposed road were to be held, *per se*, a judicial determination that a public road be laid out, when none before existed. Such an order may be *prima facie* evidence of the existence of the road, but it is competent for the inhabitants when sued, for refusing to work, or for the person appointed overseer, when indicted for not putting the road in order, to shew that there is no such road to be made or repaired."

The defendant is indicted as an overseer, for neglecting to keep the road in repair. He says there is no such common highway, and that the order in the county court was void and of no effect. The facts are, that, in 1827, the legislature authorized certain commissioners to lay off a road, which road was vested in Col. Avery for twenty-five years, he undertaking to make and keep it in repair, for and during that time, in consideration of the exclusive

privilege conferred on him of taking tolls and owning it as a *turnpike* road. The road was accordingly made and gates erected and toll received for some four years, when Avery threw open his gates and allowed any one to travel along it who chose, and he expressed a willingness that the county might take it as a county road. This state of things continued for about 12 years, when the county court, without a petition being filed, and notice given as the statute requires, made an order, appointing the defendant overseer, and assigning hands.

We agree with the defendant, that this was not a common public highway, which the inhabitants are bound to keep in repair. It was chartered and originally made as a turnpike, and it has not been changed into a common county road, by any such proceeding, as the law requires. Avery, by *non-user*, has subjected his franchise to forfeiture; but it is not in fact forfeited, and the right divested. That can only be done by judgment on *si fa;* on the same principle that an estate of land can only be defeated by force of a condition upon *actual entry*. There has been no surrender of the franchise; that could only be with the consent of the legislature, the grantor; and there has been no "dedication" of the road to the public. A dedication, like most other matters, can only be effectual with the consent of both parties. Avery we will suppose willing to make the dedication; still it has not been accepted by the proper authority, acting for and on behalf of the public: and admitting, that, had a petition been filed in the county court, setting out a wish to dedicate, and praying that it might be established as a common public road, and due notice, with the right of appeal according to the statute, that the proceeding would have been effectual to make it a common public road, still *that has not been done.* And admitting that if the public had used it as a road and the county court had so

recognized it, by the appointment of overseers and hands to keep it in repair *for twenty years*, which is the shortest time, that there would then have been the presumption of a dedication; still that has not been done, and so there has neither been an express nor an implied dedication. Several cases were cited, as to the manner of dedicating streets, by laying off and settling lots in towns. Those cases have no bearing, because the manner of establishing county roads, is expressly regulated and provided for by statute.

The case may be looked at in another point of view. The franchise has never been divested out of Avery. Suppose the defendant had gone on and put the road in good repair, and Avery had then erected his gates, as he might have asserted a right to do; it would have presented a strange state of things! Or suppose the solicitor had sent a bill of indictment against Avery for not keeping his road in repair, as he had undertaken to do, for the term of 25 years, and that and the present indictment were called for trial at the same time—a strange state of things would have again been presented; and yet, there is no question, that Avery has, during all this time, been liable to an indictment. If he made a bad bargain or "missed his calculation," he ought to have petitioned the legislature to accept a surrender.

It was probably expedient to have this road, provided those who used it would pay for making and keeping it in repair; but *non constat* that it is expedient to establish the road, if the labor of a sparse population is to be taxed to keep it up.

The judgment in the court below must be reversed, and judgment for the defendant.

PER CURIAM. Judgment reversed and judgment for the defendant.

JAMES C. TURRENTINE v. THOMAS FAUCETT.

Where a sheriff arrested a man on a ca. sa. and committed him to jail, in custody of the jailer, and the prisoner escaped: *Held*, that, without a week of misconduct the jailer was only bound to the sheriff for want of diligence or due care in the discharge of his duty.

A sheriff has a right to take a bond from the jailer to indemnify him for all losses, or which he may be subjected by the escape of a prisoner, while in custody of the jailer.

Appeal from the Superior Court of Law of ORANGE County, at the Fall Term, 1850, his Honor, Judge *Manly*, presiding.

In this case the following facts are agreed upon by the parties: That one Fleming was committed in due course of law, as a debtor in execution, at the instance of Rosa Adams in one case, and of John P. Mabry in another case, to the custody of James C. Turrentine, the plaintiff, as the sheriff of Orange county, and he delivered the said Fleming to the defendant, Faucett, the jailer of said county: and he remained in close prison until the night of the 1st of November, 1844, when he made his escape by his own act, assisted by some one from the outside of the prison, by cutting through the iron bars of the window, but without the knowledge or consent or actual negligence of the defendant. The plaintiff was sued for an escape, as sheriff, in an action of debt, by both Adams and Mabry, who effected recoveries against him for their debts against Fleming. And on the 20th day of August, 1849, he paid said Adams the amount of his judgment against him for

said escape, viz.: $3,630.69 and for costs of said suit $71.43. And on the 30th day of August, 1849, he likewise paid the said Mabry his said judgment, viz.: $620, and for costs of said suit $80.82: that on the same day he paid to his own attornies in the said two suits $310; and in expenses in attempting to arrest the said Fleming, $62.50: that the said Turrentine commenced an action of assumpsit for said escape against the said Faucett, as jailer, on the 15th day of October, 1847, in Orange superior court; and at March term of said court, 1849, the said plaintiff was nonsuited therein, and judgment of the court was rendered against him: and that afterwards, the said Turrentine, on the 30th day of August, 1849, commenced the present action for the same cause of action against said Faucett, as jailer: that the said Faucett was jailer and the said Turrentine sheriff on the 1st of November, 1844, when the said Fleming made his escape. Upon this state of facts, the court was of opinion, the plaintiff was not entitled to recover, and instructed the jury, that while the action was believed to be in time and not barred by the statute, yet upon the other plea, the plaintiff could not recover. There was a verdict in accordance with these instructions.

Rule discharged; judgment, and appeal.

W. H. Haywood and *J. H. Haughton*, for the plaintiff.

J. W. Norwood and *J. H. Bryan*, for the defendant, submitted the following argument:

The action is assumpsit, upon the implied undertaking of the defendant as jailer.

The common law only implies an undertaking for reasonable care, diligence and fidelity. 1 Com. Cont., 222; Bac. Ab., master and servant, M., Story on Agency, 172, 182; *Atterton* v. *Harward*, Cro. Eli., 349; *Kain* v. *Ostrander*, 8 Johns. R., 209–10.

At common law the action against the sheriff for an escape, whether voluntary or negligent, was case; it was regarded as a breach of duty and a *tort*. The same principles apply to the action of debt against the sheriff upon the statute; it is regarded as a *tort*—the action is founded "in *maleficio*." 2 Bac. Ab. Escape, 525, letter F.

The sheriff is subjected upon grounds and for reasons of policy which do not apply to the jailer. His (the jailer's) is only a common law liability, so that upon the action against him, actual negligence must be proved and actual damage shewn. If the sheriff wishes an *indemnity* from his jailer, all the old books say he must take a bond from his deputy, whereby his common law liability will be altered and his responsibility enhanced.

The responsibility of the sheriff has been assimilated to that of a common carrier, (the owner of a ship for instance,) who is subjected upon grounds of policy for all losses, except those occasioned by the act of God or the public enemy, yet his servants and agents are only responsible to him for reasonable care and diligence and skill.

If the jailer were considered a wrongdoer and liable in the same degree and upon the same principles as the sheriff, yet the general rule is, that there is no contribution between wrongdoers, 29 E. C. L. R., 37, and *indemnity* stands on the same ground. *Merryweather* v. *Nixon*, 8 T. R., 186.

PEARSON, J. One Fleming, who was in jail under a *capias ad satisfaciendum*, escaped. The plaintiff was sued, as sheriff, and forced to pay a large amount to the creditors, and brings this action against the defendant, his jailer, and declares upon an undertaking to keep the said Fleming faithfully and securely, and on failure to indemnify and save the plaintiff harmless from all loss or

damage. It is stated in the case agreed, that Fleming made his escape without the knowledge or consent, or *actual negligence* of the defendant.

The defendant by his counsel admits, that there was an implied undertaking to keep the prisoner faithfully and diligently, but denies, that the law implies an undertaking to keep *safely* or *to indemnify*.

The judge in the court below so decided. To this the plaintiff excepts. There is no error.

For the plaintiff it is said, the sheriff is by law bound to keep prisoners *safely*. The defendant, when he undertook to act as jailer, must be presumed to have done so with reference to this liability of his principal; hence, there is an implied undertaking on his part, so to act as to prevent his principal from being subjected to loss; or, in other words, there is an implied undertaking to keep safely or indemnify.

For the defendant it is said, the general rule is, that agents, servants, and bailees, where the contract is for the benefit of both parties, are only liable for ordinary neglect. In the case of sheriffs, common carriers, and inn-keepers, an exception is made; they are held liable as *insurers*, except against "the act of God, and the king's enemies," upon the ground of *public policy*. This reason does not extend to their deputies, agents and servants. Therefore, the latter do not fall under the exception, but stand under the general rule.

The argument for the plaintiff clearly shows the expediency of taking a bond of indemnity, (as sheriffs usually do). But if he neglects to do so, *non constat* the law will imply an undertaking to keep prisoners safe or indemnify. An undertaking to act faithfully and diligently, is implied by law. This, the jailer is *able to do*, if he will. But when it comes to *insuring*, that prisoners will be kept safely, and indemnifying against acts beyond the control of the jailer, and which do not fall within the reach of ordinary dili-

gence, it is clearly a different question. This higher obligation, which the law, from motives of public policy, imposes on the superior, can only be imposed on the inferior by an express undertaking. Public policy is satisfied by holding the superior responsible. As between him and his jailer, the general rule applies, unless there be an express agreement to indemnify.

To illustrate: a railroad company, as a common carrier, is bound to insure every article bailed to be carried; because, public policy requires it, and it is presumed the rates are fixed in reference not only to the trouble of carrying, but to this liability.

This policy does not extend to the conductor of a train, and there is no presumption, that he has undertaken a higher degree of responsibility, than that which is imposed by the general rule, in the absence of an express undertaking to that effect, in consideration of higher wages. So, although the company be chargeable, as a common carrier, he is not liable over, without proof of a want of ordinary care.

It is suggested, that if this liability is not implied by law, it is unlawful to take a bond of indemnity and such bond is void; and that the real purpose of taking these bonds is not to add to the liability, but to increase the security.

It is against law to take a bond of indemnity, and thereby encourage or permit an unlawful act—as to give a stranger a key and free access to the jail. But an indemnity from the jailer is an inducement to make him more strict and vigilant in the discharge of his duties. Sheriffs have, for this reason, always been allowed by bond or express undertaking of jailers and deputies, to raise the responsibility of the inferior to the same degree as that imposed on the superior.

The practice of taking bonds has been so uniform, that we have not been able to find a single case like the pres-

ent. There is, however, an old case, in a report of high authority, which fully sustains our conclusion. *Atterton* v. *Harward*, Croke Eliz., 349. That was case by a bailiff against a debtor for making his escape, whereby the creditor recovered of the sheriff, and he of the bailiff, on his assumpsit to save the sheriff harmless against all escapes; and so the bailiff sought to recover of the debtor, for making his escape, by which *tort* he had been subjected to damage. Upon not guilty, it was found against the plaintiff. The court was of opinion, "that the bailiff was not chargeable to the sheriff by law, but by *his assumpsit*, and this being his voluntary act, shall be no cause to charge the defendant, but shall make himself liable." But they argued, "if the bailiff had been chargeable *by law*, without *such promise*, an action did lie for him against the defendant, who caused him to be charged."

Upon the authority of this case, in *Kain* v. *Ostrander*, 8 John, 207, it is said, "the usual course is to resort to his bond of indemnity, and if he has omitted to take one, the jailer is only answerable on his implied undertaking to serve the sheriff with diligence and fidelity." And the decision is in favor of the jailer, on the ground, that there was no evidence of that *culpable neglect*, which is requisit to make a jailer liable.

PER CURIAM. Judgment reversed.

NOTE.—In consequence of the indisposition of Judge NASH, very few opinions were delivered by him at this term.

GENERAL ORDER.

Students, preparing to be examined for a superior court license, are required hereafter to read ADAMS' DOCTRINE OF EQUITY, instead of FONBLANQUE.

APPENDIX.

STATE v. JOHNSON.

The following dissenting opinion of NASH, J., *should have been inserted at page* 651.

NASH, J. The consideration, which I have been able to give this case, leads me to a conclusion different from that to which a majority of the Court have come. From the facts set forth in the special verdict I am of opinion, that the road, over which the defendant was appointed overseer, was at the time of his appointment a public road or highway, duly constituted; and that the defendant was bound to keep it in the repair required by law, and for neglecting to do so he was guilty of a misdemeanor and punishable by indictment. Originally, the road was a turnpike, erected under the authority of an act of the general assmbly of the state. It was completed in 1830, toll gates erected and the proper tolls exacted from those bound to pay them. At the end of four years, the gates were removed by the grantee of the franchise, and the road thrown open to the public, and so continued for twelve years, the citizens of the country, for all that period, passing and repassing as over any other public highway. At the end of this time, the county court, at the instance of a portion of the citizens of the county, and with the knowledge of the grantee, appointed the defendant overseer of that portion of the road embraced in the indictment. The whole of the road lay within the county of Yancey. The objection is, that the county court had no power to constitute this road a public road, in the manner in which it was done, and that, therefore, the appointment

of the defendant, as overseer, was void and of no effect. If the first proposition fails, the second follows, of course, its fate.

There are three modes known to our law, by which a public road may be established—by dedication, by an uninterrupted use of it by the public for twenty years, and by the mode pointed out for legislative acts. The two first are by the common law, and have been repeatedly recognized by the decisions of the Supreme Court. *Woollard* v. *McCullock*, 1 Ire., 436; *State* v. *Marble*, 4 Ire., 320; *Smith* v. *Harkins*, 3 Ire. Eq., 622. When the road, in this case, was finished by the grantee, according to his contract, he acquired in the land over which it ran, for the term specified in his charter, a legal interest, which was liable to the payment of his debts, and if sold under execution against him, the purchaser would acquire a valid legal title to the interest owned by him. In such case, the ownership of the land or road would be separated from the franchise, which would still remain in the grantee, for it could not be sold. *State* v. *Rives*, 5 Ire., 297. This property or interest in the land or road was susceptible of being dedicated by the grantee to the public; for, in *Smith* v. *Harkins*, his Honor the Chief Justice, in delivering the opinion of the Court, states it as a plain principle, that "private persons may dedicate their land or other property to the public." Here, the owner of the turnpike road abandoned it to the public, by removing his gates and suffering the public to pass over it free of toll. It is true, that no use, short of twenty years, will raise a presumption of a dedication; but here there is no room for a presumption—the case states he did abandon it to the public use, which is in itself a dedication. There is no form, by which a dedication shall be made, pointed out in the authorities; and I can conceive of no other better adapted to the purpose, more expressive of the intention of the grantee, than the one adopted by him, more

especially as the land itself, over which the road ran, which is embraced in the indictment, was his freehold. I admit, that the grantee here could not, of his mere action, by such an abandonment of the road strip from his own shoulders the obligation of keeping the road in repair and throw it upon the public. Something more was necessary—the public, through its constituted authorities, must accept the road. This, I hold, has been done by the county court of Yancey, in appointing overseers over the road. In *Smith* v. *Harkins*, it is declared by the Court, that " the making and regulating roads, fences and bridges are the proper subjects of political action and are *necessarily* governed by the will of the law making power, or of those, to whom it may be delegated," p. 622. This is said in reference to the claim by the defendant in that case to erect a free bridge and dedicate it to the use of the public. The Court admit the principle, but qualify it with an exception, " but not so as to injure or impair exclusive rights, previously granted by the public. To authorize such interference they must show the *acceptance* thereof by the regular organs of the community, the constituted authorities ;" and at page 620 they show, that the constituted authority meant in that case was the county court. And such is the spirit and meaning of the legislative acts of our state. It is said, however, that this is not an open question—that the case of *Baker and Wilson*, 3 Ire., 169, is decisive of it. To my apprehension, that case does not justify the conclusion, which is drawn from it. That conclusion is, that the county court of Yancey could not, by their acceptance of the road in this case, constitute it a public road—that, in order to constitute it such by their action, the directions of the act of 1785 must be pursued ; nor would it have been an authority in this case, if it had so decided. The facts in the two cases are essentially different. What were they in the former? The government of the United States, by its agents, had sur-

veyed and marked out a line of road, *contemplated* to be made under its authority; but no such road was opened; and the county court, acting upon the idea that the survey constituted a public road, appointed the defendant as overseer upon it. The Court decide, that the appointment of the overseer was void; and the opinion shows clearly why it was so. His Honor Judge GASTON says: "Our laws are explicit in requiring that no *new* road shall be laid out, but by a judgment of the Court upon petition filed." "These requirements, (that is, as set forth in the 2nd section of the act of 1784,) would be substantially annulled, if the mere appointment of an overseer or assignment of hands to a *supposed* road were to be held, *per se*, a judicial determination, that a public road be laid out, where *none existed before*." In speaking of the liability of the overseer and hands, the opinion concludes, "But neither the one nor the other have failed in the performance of duty in regard to a public road, if it appear, that such road has no existence either in law or in fact." This opinion, as I understand it, establishes this proposition, and no other, that when there is no road in existence, no road *de facto*, the *county court* cannot lay off or establish a *new* road on land previously granted without pursuing the requirements of the act of 1784. If the decision had the effect now attributed to it, it would be a virtual abrogation of the common law mode of establishing public roads; and that would be directly in conflict with the opinion of this Court in *Woolland and McCullock*, where it is decided, that the common law modes of establishing public roads are not repealed by our statutes or any of them. In this case, there was a public highway in existence, when the order was made appointing the defendant an overseer over it—a road established by the highest authority known to the law in the establishment of roads, and which had been used by the public for twelve years as a public road.

To such a state of facts, the case of *Baker* v. *Wilson* does not apply, nor could the court have intended it should. Suppose the road had been kept up as a turnpike, until the expiration of the charter, and either the legislature had refused to re-charter it, or the owner did not desire it; or suppose, that the owner of the franchise had, after erecting the road, forfeited it, and by due course of law the charter had been repealed—or suppose the owner of a tract of land, adjoining the town of a newly established county, opens a road through it to the town and gives it to the public—can it be pretended, that in either of these cases, the county court cannot adopt the road, as a public road, without a petition regularly filed and a jury? Where the necessity of a petition—the road is already in existence? Where the necessity of a jury—it is already laid off? Whether the public interest or convenience requires a public road there, the county courts are the exclusive judges. The language of the acts of 1784 and 1813 strongly sustains I think, the view taken by me. It is, "the courts of pleas and quarter sessions shall have full power and authority, &c., to order the *laying out* of public roads," &c., evidently showing, that the provisions in them extended only to the establishing of *new* roads. But it is further said, the owner of the franchise could not surrender it to the county court. Let that be so. It is not necessary in my view to decide that question here. The freehold in land may be in one person, and a right of way over in another. The ownership of the road and franchise are separate and distinct interests and are governed by separate and distinct rules. In conclusion, I can but repeat, that, in my opinion, the dedication of the road in question was complete so far as the owner of it was concerned, when he removed his gates and abandoned it to the use of the public, for it is rather the intention of the owner, than the length of time of the use,

which must determine the fact of dedication; Woolidge on Ways, p. 11, and 11 East, 376; and that the county court had the power to accept the dedication, and by the appointment of overseers did accept it. I consider the opinion of the Court in this case, as materially shaking the authority of those previously made by the Court, on the subject of public roads.

INDEX.

ACCOUNT, ACTION OF:

1. In the action of account there are two judgments; first, that the plaintiff and defendant account together; secondly, that the plaintiff or the defendant recover the balance found to be due from the one to the other. *McPherson* v. *McPherson*, 391.
2. In order to obtain the first judgment, it is not necessary for the plaintiff to shew that the defendant is indebted to him as bailiff, &c. He need only shew that he is bound to account with him as bailiff, or as a tenant in common, who has been in the pernancy of the profits, and the right to this judgment can only be barred by proof on the part of the defendant that he has already accounted, or by a denial, uncontradicted on the part of the plaintiff, of the existence of any such relation between the parties as gives the plaintiff a right to call for an account. *Ib.*
3. Where there are several tenants in common, some of whom have been in the receipt of profits and some not, each of the latter must bring his own action of account for what he claims—they cannot bring a joint action in the names of two or more, to recover their several shares. *Ib.*
4. So where several tenants in common receive the profits, unless it can be shewn that they received them jointly as partners, an action of account cannot be brought against them jointly, but each must be sued separately. *Ib.*
5. If either of these cases appear upon the trial, the Court will will order a nonsuit. *Ib.*
6. Every tenant in common, who has been in the enjoyment of the property, is liable to account; and it is not material what was the mode of enjoyment, whether he used it merely for shelter, or as a means of supporting himself and family, or made money by selling the products, or received money as rent. *Ib.*

ACTION ON THE CASE:

1. As soon as the owner of an animal knows or has good rea-

sons to believe, that he is likely to do mischief, he must take care of him and be responsible for any injury that he may inflict; and it makes no difference, whether this ground of suspicion arises from one act or from repeated acts. *Cockerham* v. *Nixon*, 269.

2. The act done, however, must be such as to furnish a reasonable inference, that the animal is likely to commit an act of the *kind complained of:* this is a matter to be decided by the jury and not by the court. *Ib.*

3. In an action on the case, a count in deceit, for knowingly misrepresenting the soundness of a chattel, may be joined with a count for the breach of a warranty of the soundness of the same chattel. *Lassiter* v. *Ward*, 443.

4. The degree of care to be taken of a hired slave does not differ from that required as to other things. *Heathcock* v. *Pennington*, 640.

5. It is erroneous to leave the question of due care to the jury; since it is the province and duty of the court to advise them on that point, supposing them to be satisfied of certain facts. *Ib.*

6. Ordinary care is that degree of it, which, in the same circumstances, a person of ordinary prudence would take of the particular thing, were it his own, and it will differ much, according to the nature of the thing, the purpose for which it was hired, and the particular circumstances of risk, under which a loss occurred. *Ib.*

7. If an owner hire out his slave for a particular purpose, it is to be understood he is fit for it, and, therefore, he may be set to that service, and kept at it, in the way that is usual. If there be risks in such service, it is to be presumed the owner must have foreseen them, and provided for them in the hire. *Ib.*

ADMINISTRATORS:

See Executors and Administrators.

ADVANCEMENT:

See Intestate's Estates.

AGENT AND PRINCIPAL:

1. Where A., a citizen of North Carolina, appointed B. in Tennessee to lease for him a certain tract of land in the latter

state, and B. accordingly leased it, but the lessor, not being willing to trust A., required B. to give his own note for the rent, which he did and afterwards paid it; *Held*, that this was an undertaking by B. within the scope of his general authority; that A. was bound to reimburse him, and that it was not necessary for B. to give A. any notice of the payment to entitle him to an action against A. for the money so paid. *Irions* v. *Cook*, 203.

2. One, who has only a verbal authority to sell a slave, can transfer the title by a sale and actual delivery. *Osborne* v. *Horner*, 359.

See Reward; Demand.

APPEAL:

1. An appeal will not lie from the decision of the county court, upon a petition for draining the petitioner's lands, through those of others. *Stanley* v. *Watson*, 124.
2. Where there is a judgment against two or more, an appeal cannot be granted unless all the defendants join in the appeal. *Kelly* v. *Moye*, 182.
3. An appeal will not lie to the superior court, from the decision of the county court, on a petition, by an alleged lunatic, to have the verdict of an inquest in his case set aside, and the guardian appointed in pursuance thereof removed. *Ray* v. *Ray*, 357.
4. Where three are sued in debt, and one of the defendants, not contesting the plaintiff's right to recover, pleads that he is a co-surety of one of the other defendants, and a verdict is found against him, it is very doubtful whether he can appeal at all; but certainly not alone. *Loftin* v. *Kornegay*, 437.

See Executors and Administrators; Evidence.

APPROPRIATION:

See Contract.

ARBITRATION AND AWARD:

1. Tenants in common agreed to a division of their land, and covenanted that it should be referred to A. and B. to value their respective parts, and that the party refusing to abide by the award should pay a certain sum as *stipulated damages*, and not as a penalty. The covenant further provided

that " The valuation should be made upon such examinations and surveys, as the referees might think proper, of which they were to be the sole and exclusive judges." The award having been made and one of the parties objecting, *it was held*, upon a suit for the stipulated damages, that the award was good, notwithstanding but one of the referees made the survey, the other relying upon such survey and on his own previous knowledge of the land, the referees having, by the terms of submission, a discretionary power to make such surveys as they might think proper. *Devereux* v. *Burgwin*, 490;

2. *Held*, further, that the award cannot be impeached in a *court of law*, by shewing that it was procured to be made, unfairly and by the exertion of undue influence. *Ib.*

3. *Held*, further, that the award cannot be impeached by shewing, that, after the submission, one of the arbitrators had become addicted to intemperance, to such an extent as to impair his mind, unless it be further shewn, that at the time he made his award, he was so drunk as not to know what he was doing, or his intemperance had been carried on to such an extent, as to reduce him to a state of *fatuity*, so that he had no mind. *Ib.*

4. These two last conclusions do not apply to cases, where the award is made under a rule of Court. There, the Court retains a supervising power, and will see that the award was not obtained by unfairness or undue means, when a summary judgment is moved for. *Ib.*

ASSAULT AND BATTERY:

1. Whether, when a man presents a pistol at another, threatening to shoot, and the pistol is not loaded, he is guilty of an assault, may admit of some question, but the man charged, clearly, cannot be excused, unless he proves that it was not loaded. The state is not bound to prove that it was loaded. *State* v. *Cherry*, 475.

2. Insolence from a free person of color to a white man, will excuse a battery, in the same manner, to the same extent, as in the case of a slave. *State* v. *Jowers*, 555.

ASSUMPSIT:

1. Where A. sold to B. a tract af land, conveyed to him by a deed containing a covenant for quiet enjoyment, and, upon discovery that a part of the land previously belonged to

B., A. offered to pay to B. the value of this part of the land, so as to avoid a suit on the covenant; *Held*, that an action of assumpsit would not lie on this proposition, because B. had not acceded to it. *Burns* v. *Allen*, 25.

2. An action of assumpsit for the use and occupation of land will not lie in this state, unless there be an express promise to pay rent. *Long* v. *Bonner*, 27.

3. Where A. contracted to deliver to B. a certain quantity of corn, if called for by a particular day, and B. did not call for it till some time afterwards; *Held*, that B. was not entitled to recover in *assumpsit* on the contract. *Brown* v. *Ray*, 222.

ATTACHMENTS:

1. Wherein a suit by A. and B., copartners, against C., he pleaded, that in his garnishment on an attachment against A., one of the present plaintiffs, he had admitted that he owed A. the sum for which he is now sued, and he had paid the judgment rendered against him on the garnishment; *Held*, that this plea did not avail him, for he had confessed a debt due to A. alone, being different from that to A. and B., now sued on. *Cook* v. *Arthur*, 407.

2. Where one is summoned as garnishee in an attachment, who owes a note which is negotiable; if he chooses to stand upon his rights, no judgment can be taken against him, without proof that the absconding debtor still holds the note, or had not assigned it, by endorsement before it was due, for, otherwise, it does not appear that he is indebted to the absconding debtor. *Ormond* v. *Moye*, 564.

See Partners.

AUCTION:

Where, before a hiring commenced, a paper writing was read, purporting to contain the terms of the hiring, and also before the hiring commenced, the crier in an audible voice announced other terms; *Held*, that the hirer or his agent had a right to make such alteration. *Satterfield* v. *Smith*, 60.

BASTARDY:

A free person of color is chargeable with the support of a bastard child begotten by him on a white woman. *State* v. *Haithcock*, 32.

BILLS, PROMISSORY NOTES, &c.:

1. The sole purpose of the act of 1827, Rev. Stat., ch. 13 and 11, relating to indorsers, was to turn the conditional contract between the indorser and the holder of a bond, into an unconditional one. It was not intended to charge the indorser, as if he had executed bond as a co-obligor, or upon an indorsement without consideration or to deprive him of the statute of limitations. *Topping* v. *Blount*, 62.

2. The interest in a bond payable to A., or to A. or order, can only be transferred at law by indorsement. *Fairly* v. *McLean*, 158.

3. Where a note or bond is assigned after it is due, the assignee holds it subject to all the set-offs and payments to which it was subject in the hands of the payee. *Turner* v. *Beggarly*, 331.

4. Otherwise, when the note or bond is assigned before it is due, unless the payments are endorsed on the instrument. *Ib.*

5. Although a bill or promissory note may be made payable to A. B. or bearer, yet a bond cannot. That being a deed, it must be made to some certain obligee, to whom it may be delivered. *Marsh* v. *Brooks*, 409.

6. After the bond has become a perfect instrument, the obligee can, by indorsement, order the payment to be made to the bearer, for, in respect to their transfer, notes and bonds are put on the same footing. But their nature, in their inception and before indorsement, is not touched by the statute and remains as at common law. *Ib.*

7. Where A. brought an action to recover the amount of a bill of exchange, which he had drawn on B. in favor of C., and which had been accepted by B. and afterwards came into the possession of A. without indorsement; *Held*, that A. could not recover on a count on the bill, because it had not been endorsed to him; and that he could not recover on a money count, without shewing either that the bill had been endorsed to him or in blank, or that he had been obliged to pay the money in consequence of his liability as drawer, or that they had accounted together and the acceptor been found indebted to the drawer in the amount of the bill. *Smith* v. *Bryan*, 418..

8. However it may be, as to notes payable *on demand*, whether or not they are considered over-due until demand made;

it is certain that a note, payable "at sight" or "when presented," is not due until it is presented. *Ormond* v. *Moye*, 564.

SEE GUARANTY.

BONDS:

1. An obligation in these words, "On or before the first day of January next, I promise to pay to Robert S. Burney or order $160, for the hire of a negro by the name of Abram, and the use of two full crops of boxes on Moore Creek. Witness," &c., is not a conditional obligation. *Burney* v. *Galloway*, 53.
2. An obligation for a certain sum, payable in specific articles at a particular time and place, becomes, after it is due, necessarily an obligation payable in money, unless the defendant pleads and proves a tender of the articles, at the time and place mentioned in the contract. *Hamilton* v. *Eller*, 276.
3. A. died leaving three children, of whom B., the defendant, was the guardian, and who had slaves left to them by the will by C. to the amount of upwards of six hundred dollars. B. gave to D., the plaintiff, a bond, executed on the 4th of February, 1846, of the following purport: I promise to pay D. three hundred and sixty dollars, being in consideration of money which he paid for A. and his heirs, which sum I am to pay when it can be raised out of the estate left to them by the will of C." The writ was issued nearly three years after the date of the bond; *Held*, that the true construction of this bond is, not that the payment should be delayed, until the guardian could raise the amount out of the hire and profits of the property, but that it should be made as soon as the guardian could, by proper proceedings, raise the money by the sale of property, and that this could have been done within less than three years. *McRae* v. *McRae*, 266.

SEE BILLS, &c.

BOOK OF DEBTS:

Under the book debt law, Revised Statutes, chapter 15, in order to entitle the party to recover, he must swear, not only that he "sold," but also that he actually "delivered," the articles, for the price of which the suit is brought. *Adkinson* v. *Simmons*, 416.

BOUNDARY:

When a deed from A. to B. calls for the line of an adjoining tract, testimony cannot be introduced to control that call, by shewing that, at the time of the execution of the deed, they ran to a different line; that B. afterwards said this last was his line, and that A. and those who claimed under him cultivated for many years up to this line. *Johnson* v. *Farlow*, 199.

CERTIORARI:

1. Where a *certiorari* is returned to Court, no proceedings can be had on it, until notice of its return has been given to the person, against whom it is issued. *Bowman* v. *Foster*, 47.
2. Where money has been paid into a clerk's office upon a judgment, and the judgment is assigned, or the attorney's receipt for the note on which the judgment was obtained has been transferred, by the plaintiff in the judgment to a third person, such assignee has no right to sue the clerk for the money in his own name, as he had but an equitable interest. *State* v. *Miller*, 235.

COLOR OF TITLE:

Where a deed was delivered merely as an escrow, and never absolutely, was not registered and was finally destroyed by the maker, by the consent of the party, to whom it purported to be made, it cannot constitute a color of title. *Chastien* v. *Phlips*, 255.

CONSTABLES:

1. Constables are not general collecting agents, except so far as relates to claims within the jurisdiction of a magistrate. Therefore, where an order of the county court was put into a constable's hands for collection; *Held*, that though he received the money, his sureties were not liable. *State* v. *Outland*, 134.
2. When, in an action upon a constable's bond, the breach assigned is, that the constable "had failed to return to the relator the note" which he had placed in his hands for collection, it is sufficient defense for the officer to shew, that he had obtained a judgment on the note; for then the note became merged in the judgment and remained in the hands of the justice. *State* v. *Hooks*, 371.

3. When a constable is appointed by the county court at May term, his appointment expires at the next February term, which is the regular time prescribed by law for the qualification or appointment of constables. *State* v. *Burcham*, 436.

CONSTITUTION:

SEE CORPORATIONS; EVIDENCE.

CONTRACT:

1. A cropper has no such interest in the crop, as can be subjected to the payment of his debts; while it remains in mass, until a division, the whole is the property of the landlord. *Brazier* v. *Ansley*, 12.
2. The doctrine of appropriation, as constituting a delivery and thereby passing the title to the purchaser, arises in cases of a sale of goods generally, as distinguished from the sale of a specific chattel. And when a less quantity, out of a larger, is the subject of the contract, then no property passes to the purchaser until a delivery, for until then the goods sold are not ascertained. *Ib.*
3. The vendor may appropriate the quantity purchased by separating it from the bulk: but the appropriation is not complete until the vendee assents to take the separated portion. *Ib.*
4. A promise by A., that if B. will marry and have a child by his wife, he will pay him a certain sum, is a valid contract, and upon the contingency happening, B. is entitled to recover the amount, with interest from the time his child was born. *Gurvin* v. *Cromartie*, 174.
5. Where one had a claim against three distributees, on account of assets received from an intestate's estate, and they jointly promised, verbally, that they would pay the debt; *Held*, that this promise was void under our statute, being only oral, because each of the defendants was liable separately in proportion to the assets he had received, and by this promise each made himself responsible for the liability of the others. *Hill* v. *Doughty*, 195.
6. A. sold a tract of land to B. and gave him a bond, for the title, and B., as the price of the land, promised verbally to pay one hundred dollars to C. to whom A. was indebted; *Held*, that this case does not fall under the 10th section of the statute of frauds. Rev. Stat., ch. 50, sec. 10 and 8, relat-

ing to promises to pay the debts of other persons, because the promise is to pay the debt of the very person, to whom the promise is made. *Rice* v. *Carter*, 298.

7. But in such a case the promise, being verbal, comes within that provision of the 8th section, which provides that all contracts to sell or convey lands, &c., shall be void, unless such contract or some memorandum or note thereof be put in writing and signed by the party to be charged therewith, &c. Under this part of the section, the verbal promise was void. *Ib.*

8. Where there is a contract for the sale of a slave, and the question was, whether it was the intention of the parties that the contract was to be considered executed or only executory, the court cannot decide that question, but must leave it to the jury. *Featherston* v. *Featherston*, 317.

9. Where a person hired a negro to another, and one of the stipulations at the hiring was, "that the negro should not go by water," and the person who hired the slave permitted others to use him and by them he was employed on the water, in consequence of which he lost his life; *Held*, that these latter persons were not answerable in damages, for the loss of the slave to the original hirer; for the stipulation was merely personal, and in no way attached to the slave. *Wilder* v. *Creecy*, 421.

10. Where a person had in store three thousand one hundred bushels of corn, and sold twenty-eight hundred bushels of it to A., but the 2,800 bushels were never separated from the 3,100 bushels and the whole was afterwards destroyed by fire; *Held*, that the property in the 2,800 bushels had not passed to A., as there had been no delivery; and therefore A. was not bound to pay the stipulated price. And this result follows, whatever may have been the intention of the parties, as to the property passing presently, on the contract being made. *Waldo* v. *Belcher*, 609.

See Assumpsit; Elections.

CORPORATIONS:

1. The legislature has the constitutional power to repeal an act establishing a county. It has the same power to consolidate, as to divide, counties, the exercise of the power in both cases being upon considerations of public expediency. *Mills* v. *Williams*, 558.

2. The purpose of making all corporations is the *public good.*

The only substantial difference between corporations is, that, in some cases, they are erected by the *mere will* of the legislature, there being *no other party interested or concerned*, and these are subject at all times to be modified, changed or annulled. *Ib.*

3. Other corporations are the result of contract; the legislature, for the purpose of accomplishing a public good, chooses to do it by the instrumentality of a *second party.* These two parties make a *contract;* the legislature, in consideration of certain labor and outlay of money, conferring upon the party of the second part the privilege of being a corporation, with certain powers and capacities. Being a *contract*, it cannot be modified, changed or annulled without the consent of both parties. *Ib.*

4. Counties, &c., belong to the first class; railroad and turnpike companies, &c., are instances of the second class. *Ib.*

See Roads; Turnpike Companies.

COSTS:

1. Where a person sued *in forma pauperis*, and recovered a verdict, but the judgment was for the amount of the verdict only, and not for the costs, he cannot afterwards, upon a rule, have an order that execution shall issue against the defendant for his costs. *Carter* v. *Woods*, 22.

2. While a suit is in progress, the witnesses have a right to demand from the party, at whose instance they are summoned, the payment for their attendance at the end of each term, or as soon as the suit is disposed of. Their claim after judgment is not against the person summoning them, but against the person bound to pay the costs under the judgment, unless the party so bound is insolvent. *Ib.*

3. Where the general character of a party in an action of slander is attacked, and several witnesses are introduced for the purpose of sustaining the attack, the act of assembly, requiring only two witnesses to a fact to be taxed in the bill of costs, does not apply. It is a case for the exercise of the discretion of the judge presiding at the trial. *Holmes* v. *Johnson*, 55.

See Roads; Executors and Administrators; Criminals.

COVENANTS:

The assignment of a covenant for the delivery of slaves does

not, at law, transfer the interest in the covenant. *Cook* v. *Arthur*, 407.

COUNTIES:

See Corporations.

CRIMINALS:

When a criminal case is removed for trial from one county to another, in which the prisoner is convicted, the expense of guarding the jail in the county in which the conviction takes place, must be defrayed by the county from which the case was removed. *State* v. *Justices of Anson*, 195.

CROPPER:

See Contract.

DAMAGES:

In an action against the representatives of a deceased, who had committed a trespass on the property of the plaintiff, the plaintiff cannot, no matter however aggravated the trespass may have been, recover vindictive damages. *Nippey* v. *Miller*, 247.

See Vendor; Mills; Interest.

DEEDS:

1. A deed, after reciting a sale of land by execution, proceeds thus: "In consideration, &c., the said P. R., sheriff, &c., doth hereby bargain, sell, alien, enfeoff, convey and confirm *with* the said James T. Brooks, &c., their heirs and assigns, &c., to have and hold the same to the said, &c., their heirs and assigns": *Held*, that the use of the word *with* does not affect the sense or operation of the instrument: as, upon the contrary, it is evident, between or with whom the contract is, and by and to whom the estate is conveyed. *Brooks* v. *Ratcliff*, 321.
2. What the description in a deed for land means, or whether it conveys any definite idea, are questions for the court, and ought not to be left to the jury. *Edmundson* v. *Hooks*, 373.

See Frauds, &c.; Evidence.

DEMAND:

Where money has been received by an agent, a demand or mis-

application of the money is necessary before an action can be brought, and the statute of limitations only begins to run from the time of such demand. *Waring* v. *Richardson*, 77.

DETINUE:

Where A. was entitled to a life estate in slaves, and, being threatened with a suit in equity to enjoin her from sending the negroes out of the state, in consideration that the suit should be forborne, agreed that the slaves should be placed in the possession of B., who was to pay her the hires annually, and they were accordingly so placed in B.'s possession; *Held*, that A. thereby transferred all her legal interest to B., there being a sufficient consideration and an actual delivery of the slaves—that A. therefore could not support an action at law for them, but her only remedy, if B. failed to pay over the hires, was in equity. *Henry* v. *Wilson*, 285.

EJECTMENT:

1. In an action of ejectment, where the plaintiff declares in a single count, upon the *joint and several demise* of different persons, he must be nonsuited. *Bonner* v. *Carr*, 45.
2. Where a recovery is had in ejectment, upon the several demises of different persons, all the lessors may unite in a joint action for the mesne profits. *Camp* v. *Homesley*, 211.
3. Where the lessor of the plaintiff in ejectment claims as purchaser at an execution sale, made under a judgment in which he was himself the plaintiff, he must shew the judgment as well as the execution—and if the sale was by execution under a decree in equity, he must not only shew the decree, but also the bill and answer and so much of the pleadings and orders as will shew, that the decree was pronounced in a cause properly constituted between the parties. *Lyerly* v. *Wheeler*, 288.
4. In an ejectment brought by a purchaser at sheriff's sale against the defendant in the execution, the latter, while still in possession, cannot resist, upon the ground that he, the defendant, has a better title. *Ib.*
5. A recovery in ejectment will not support an action for the *mesne* profits, unless the lessor has regained the possession,

either by being put in under process, or by being let in. *Poston* v. *Henry*, 301.

6. Where a recovery in ejectment is upon the demise of one of the several lessors, putting another lessor in possession does not entitle the lessor, upon whose demise the recovery was effected, to an action for the *mesne* profits. *Ib.*

7. In ejectment the rule is well established, that when a person is admitted by the court to defend as landlord, which he has a right to claim, he stands in the place of his tenant, and can make no defense that the tenant could not have made. *Wiggins* v. *Reddick*, 380.

8. When a man claims title under color of title and seven years' possession, it is not evidence of the adverse possession, that he had put the wife of one, who claims to be the owner of the land, in possession. When a husband is in possession, he is not deprived of it by any arrangement between his wife and a third person, pretending to own the land and to put her in possession. *Powell* v. *Felton*, 469.

See Color of Title.

ELECTIONS:

A person, who, on the day of, or previous to, an election, furnishes liquor, either at the request of a candidate or any other person, with a belief that such furnishing of liquor is for the purpose of influencing electors, cannot recover his account against the person ordering the supplies, because the contract is against good morals, and the purity of elections, and because such conduct is prohibited by our statute law. *Duke* v. *Ashbee*, 112.

EMANCIPATION:

On a petition, under our act of assembly, for permission to emancipate a slave, the right of property in the slave cannot be determined. If a claim of right in property, supported by affidavit, or otherwise, is set up, in opposition to the right asserted by the petitioner, the court should stay proceedings on the petition, until this matter can be determined between the parties, in an action at law or in equity. *Caffey* v. *Rankin*, 449.

ESCAPE:

1. Where a sheriff arrested a man on a *ca. sa.* and committed

him to jail, in custody of the jailer, and the prisoner escaped; *Held*, that, without a bond of indemnity, the jailer was only bond to the sheriff for want of fidelity or due care in the discharge of his duty. *Turrentine* v. *Faucett*, 651.

2. A sheriff has a right to take a bond from the jailer to indemnify him from *all losses*, to which he may be subjected by the escape of a prisoner, while in custody of the jailer. *Ib.*

ESTOPPEL:

1. Estoppels must be mutual, and bind only parties and privies. One, who is not bound by an estoppel, cannot take advantage of it. *Griffin.* v *Richardson*, 439.
2. Where a grand-father, since the act of 1806, made a parol gift of a negro woman to his grand-daughter, and placed the slave in the possession of the grand-daughter's father, with whom she lived, as her property, and the negro was always alleged by the father to belong to the grand-daughter; *Held*, that the father, and, of course, any person claiming under him, were estopped to deny the grand-daughter's title. *Tarkinton* v. *Latham*, 596.

See Executors and Administrators.

EVIDENCE:

1. Ordinary care, reasonable time, and probable cause, the facts being established, or proved, are questions of law, to be decided by the court. *Biles* v. *Holmes*, 16.
2. The declarations of a slave, as to his health and the condition of his body, are admissible in evidence in an action brought by his master to recover damages for an injury done to him. *Ib.*
3. Where on an indictment, the defendant pleads a former conviction, it is competent for him, to prove by one, who was not a witness on the former trial, what a witness, who was examined on behalf of the state on that trial, deposed to, though that witness was still alive and within the jurisdiction of the court, in order to shew the identity of the cases. *State* v. *Smith*, 33.
4. Where a society exists, which has its written rules and by-laws, it is not competent to show by parol testimony, that there are other rules and usages, independent of those

contained in such written rules and by-laws. *Holmes* v. *Johnson*, 55.

5. It is not competent to introduce, as a witness, a member of a firm, to prove that his individual board or any other individual debts were to be paid by the firm. *Street* v. *Meadows*, 130.

6. In an action on a bond, where evidence was given that the bond was to be delivered up, when the obligor paid the costs of a certain suit; *Held*, that this evidence was inadmissible to shew that the bond was a conditional one, but that it was proper to shew that, by the agreement of the parties, the bond was to be paid in whole or in part by the payment of the costs of the suit, and, therefore, the obligor, if he paid the costs, was entitled to a credit on the bond, *pro tanto*. *Walters* v. *Walters*, 145.

7. Where a party offered in evidence the copy of a deed, for the purpose of shewing the receipt of money, and it appeared that the deed had not been proved nor acknowledged by the supposed bargainor, but notice had been given to produce the original; *Held*, that the copy was not admissible for any purpose, as the original would not be, until properly proved. *Lambert* v. *Lambert*, 162.

8. In an action, in which is involved the *bona fides* of a contract for the sale of goods, the declaration of the vendors, at the time of the sale, that they were indebted to the vendee and an agreement between the parties that the price of the goods or a part of it was to be credited on that debt, is competent evidence though the action is against third persons for seizing and converting the goods. *Patton* v. *Dyke*, 237.

9. So also the declaration of the vendors, made some time before the contract, to another person besides the vendee, that they were indebted to the vendee, is competent evidence to prove such indebtedness in an action by the vendee against third persons. *Ib.*

10. Whether there be a seal or not to a warrant from a justice, is a mixed question of law and fact, to be decided by the judge below, and from his decision there is no appeal to this Court. *State* v. *Worley*, 242.

11. In an action brought to recover a penalty for not working on a road in Wilkes county, laid off by commissioners under an act passed in 1849, chap. 100, it is necessary, before a recovery can be effected, to shew that the com-

missioners were duly sworn as the act directs. *Colvert* v. *Whittington*, 278.

12. *Held*, that this Court cannot presume, that the emancipation of a slave is void by the laws or policy of South Carolina, but that this fact should have been proved. *Jones* v. *Abernathy*, 280.

13. The declaration of a partner, after the purchase of an article, that he had purchased it for and on account of the firm, is not, of itself, sufficient evidence to make his copartners liable. *White* v. *Gibson*, 283.

14. Where a witness for the plaintiff, on being examined as to a particular transaction, stated that he had paid a certain sum of money to the plaintiff, and the witness' credit was attacked and the transaction impeached for fraud; *Held*, that it was competent for the plaintiff to shew that he had entered the payment on his books at the time alleged. *Fain* v. *Edwards*, 305.

15. Where the subscribing witness to a deed for land or slaves and the maker are dead, or cannot be procured, whereby it cannot be acknowledged by the one or proved by the other, recourse may be had to the common law mode of proof, for the purpose of making the deed evidence at common law generally. *Currier* v. *Hampton*, 307.

16. In such a case the party would be under the necessity of giving similar evidence of the execution on the trial. *Ib.*

17. A mere mark or cross of an illiterate subscribing witness, *prima facie*, cannot be identified, and, therefore, the instrument may be read upon proof of the handwriting of the party. *Ib.*

18. Where, from the certificate of the probate of a deed, it only appeared that the witness swore, in general terms, that the signature of the party was in his handwriting, but he did not state upon what grounds he formed his opinion, nor by what means he had acquired a knowledge of the handwriting of the party; *Held*, that this evidence gave no authority to grant an order of probate. *Ib.*

19. Where a man has charged a woman with incontinence with a particular individual, he cannot, on the trial of an action for this slander, go into evidence to show that she was incontinent with other persons. *Watters* v. *Smoot*, 315.

20. The declarations of the husband, who is necessarily a party

to the suit for slander of his wife, are admissible in evidence to shew her guilt. *Ib.*

21. Where a man has conveyed a chattel, but still retains the possession, his acts and declarations, even subsequent to such conveyance, while he continues in possession, are evidence against the vendee or grantee, on a question of fraud. *Foster* v. *Woodfin*, 339.
22. The official returns of a guardian to the county court of the state of his account with his ward are admissible evidence, in an action against the clerk of the county court for neglect of duty in not issuing a *scire facias*, as required by law, to cause the guardian to renew his bond. *State* v. *Biggs*, 412.
23. In order to make the declarations of a deceased person evidence, as "dying declarations," it is not necessary that the person should be *in articulo mortis* (in the very act of dying); it is sufficient if he be under the apprehension of impending dissolution, when all motive for concealment or falsehood is presumed to be absent, and the party is in a position as solemn, as if an oath had been administered. *State* v. *Tilghman*, 513.
24. A witness cannot be admitted to state, that "he thought, the deceased thought, he would die from his wounds." He cannot give his own opinion, but only depose to the state of the wounds of the deceased and what he *then* and *there* said and did, from which the court may decide what he thought of his condition. *Ib.*
25. If the deceased, at the time he made the declarations, was, *in fact*, in a condition to make them competent evidence, a hope of recovery, at a subsequent time, would not render them incompetent. *Ib.*
26. The admission of dying declarations, as evidence, is not in opposition to that part of the Bill of Rights, which says, that, "In all criminal prosecutions, every man has a right to be informed of the accusation against him, and to confront the accusers and witnesses with other testimony." *Ib.*
27. Parol evidence may be admitted to shew a custom or usage of a place, where a contract is entered into, for the purpose of annexing incidents to, and explaining the means of terms used in it. But before the incident can be annexed, the contract itself, as made, must be proved. The incident cannot be used to establish the contract, nor can it be inconsistent with the terms of the contract. *Moore* v. *Eason*, 568.

28. It is no ground of exception to a deposition, that the notice was given to take the depositions of A., B., C., and others, and the deposition of neither A., B. nor C., was taken. *McDugald* v. *Smith*, 576.

29. Where a copy of a statute of another state has been received in evidence in the court below, upon insufficient proof, yet if it is made to appear to this court from an official and proper source, that the copy, so received in evidence, was correct, a *venire de novo* will not be awarded for that error. *Ib.*

30. Where notice has not been given to produce a bill of sale or other instrument of writing, or where its absence is not satisfactorily accounted for, it is not competent to introduce, as evidence of the execution or contents of the instrument, the oral admissions or declarations of the alleged maker.

31. A party cannot introduce secondary evidence of the contents of a written instrument, merely upon shewing that the instrument, though in existence, is in another state. *Threadgill* v. *White*, 591.

SEE BOUNDARY; MALICIOUS PROSECUTION; WARRANTY; EJECTMENT; ADMINISTRATORS AND EXECUTORS; REWARD; WILLS.

EXECUTIONS:

1. An officer, who has an execution against a tenant in common of chattels, may levy upon the undivided property and take it into his possession, for the purpose of selling the interest of the defendant in the execution; and he does not thereby subject himself to an action by the other tenant in common. *Blevins* v. *Baker*, 291.

2. Where the land of a debtor has been sold by execution and an action is brought against him to recover possession, he has no right to object that the sheriff has not made the deed to the purchasers at the execution sale, since the sheriff may convey to an assignee, whether he be an assignee by law or by contract. *Brooks* v. *Ratcliff*, 321.

3. A purchaser of land at an execution sale gets a good title, although the sale was made on Tuesday or Wednesday of the week, on the Monday of which the writ was returnable, but was not returned. *Ib.*

4. A reversion in fee, after a term for years, is the subject of execution; the sheriff's deed is as effectual to pass it as that of the reversioner; and the tenant, who claims under such deed, is not estopped from setting it up as a bar to

an action of ejectment by the reversioner. *Murrell* v. *Roberts*, 424.

5. Payment to the sheriff discharges an execution; and a subsequent sale of property under such execution is void, and conveys no title to the purchaser. *Ib.*

6. A., by a *bona fide* deed proved and registered in May, 1843, conveyed a slave to B. in trust to secure the payment of certain debts. B. by deed, conveyed the slave to C. for a certain price, all of which was afterwards paid by A. except $100. C. then by deed dated in 1847, and proved in 1849, in consideration of the said $100, conveyed the slave to D.; *Held*, that, though D. might have taken that conveyance in trust for A. upon the payment of the $100, yet while the property remained in that situation, the $100 not being paid, A. had no such interest as was liable to an execution against him. *Griffin* v. *Richardson*, 439.

7. When a vendor of land retains the title, as a security for the purchase money, and a balance remains due, the vendee has not such an interest as is liable to execution under the act, Rev. Stat., ch. 45, sec. 4, so as to divest the legal title of the vendor. *Badham* v. *Cox*, 456.

8. Under a *venditioni exponas* against land, the sheriff can sell only that, which he could have sold under the *fi. fa.* on which the *venditioni exponas* issued, while such *fi. fa.* remained in his hands unreturned. *Ib.*

9. If the defendant in an execution has no interest in land, which is subject to be levied on, while the *fieri facias* remains in the hands of the sheriff, unreturned, but, after the return, he acquires a title, which is subject to execution, this subsequently acquired title cannot be sold under a *venditioni exponas* issuing upon such *fieri facias*. *Ib.*

10. Such subsequently acquired title shall not operate as an estoppel, in favor of a purchaser at a sale, made under such *venditioni exponas*. The law only sells *estates* under its process, and not the *chances of an estoppel*. *Ib.*

11. A court martial is a court of special and limited jurisdiction. It must be organized agreeably to law, and this must be shewn distinctly by every one who seeks to enforce its sentences or justify action under its precepts. Therefore, where a company court martial, as is required by our law, must be composed of at least two commissioned officers, and it did not appear in this case that more than one commis-

sioned officer sat in the court, an execution, issued by a tribunal so constituted, is void and does not justify an officer in acting under it. *Bell* v. *Tooley*, 605.

12. Where an execution is about to be levied by a constable, the debtor, if he has personal property, must shew it, and if he does not the officer commits no wrong by levying on the land in the first instance. *Sloan* v. *Stanly*, 627.

13. So, if it does not appear that the officer knew of the existence of the personal property, he is justifiable in levying on the real estate. *Ib.*

14. If an interlineation appears on the face of an officer's return, and there is no evidence to shew when it was done, the court will presume that it was done before the return was made, when the officer had authority to alter his return. *Ib.*

EXECUTORS AND ADMINISTRATORS:

1. An administrator is protected by judgments, rendered against him within the nine months allowed him to plead, though in suits after that in which he pleads them. *Terry* v. *Vest*, 65.

2. An administrator, who establishes his plea of fully administered, is entitled, of course, under our statute, to his costs; and the plaintiff, though he take a judgment *quando*, cannot have a judgment against the surety in the administrator's appeal bond, the case having been tried upon appeal. *Ib.*

3. The next of kin cannot maintain an action on the administration bond, after the death of the administrator, because he failed to take into his possession, and distribute, certain negroes to which his intestate was entitled. These negroes pass to the administrator *de bonis non*, and are to be by him distributed. *State* v. *Britton*, 110.

4. Money belonging to an intestate, used by his widow after his death, must be accounted for by her to the administrator. *Griffin* v. *Simpson*, 120.

5. A surety to an appeal by a party, who dies pending the suit, has no lien on his assets until after he has paid what, by the judgment, he was ascertained to be liable for as surety. *Green* v. *Williams*, 139.

6. The next of kin cannot support an action on an administration bond for their distributive shares, because this

implies that the estate has not been administered, and the action should be by an administrator *de bonis non*. *State* v. *Moore*, 160.

7. An executor *de son tort* is entitled to no action. *Francis* v. *Welch*, 215.

8. One cannot be held liable as executor *de son tort*, where there is a rightful executor, except in cases alleged to be fraudulent. *Ib.*

9. The jury cannot allow commissions to an executor, &c., without a previous order of the county court; but it is not necessary that this order should be made before the commencement of the suit against the executor. *Lynch* v. *Johnson*, 224.

10. Where the plea of fully administered is found in favor of the administrator, and upon a *scire facias* against the heirs, they come in and plead that the administrator has assets; *Held*, that upon the trial of the issue upon that plea, the heirs may give evidence of any assets received by the administrator, either before or after the trial of the original suit, and up to the time of the plea pleaded to *scire facias*. *Carrier* v. *Hampton*, 307.

11. In actions by administrators, the letters of administration, granted, as they are, by a domestic tribunal of exclusive jurisdiction, and remaining unrevoked, are *prima facie* evidence of the death of the alleged intestate and of the right of representing him. *Brickhouse* v. *Brickhouse*, 404.

12. The provisions of the act of 1846, ch. 1, (Pamphlet Laws) do not apply to a case, where an administrator of the deceased was appointed before the 1st of February, 1847, though that administrator be dead, and an administration *de bonis non* be granted, subsequently to that date, when the act was to go into operation. *Powell* v. *Felton*, 469.

13. Where an executor arrests a defendant on a *ca. sa.*, sued out on a judgment obtained by his testator, and afterwards dies, and the proceedings on the *ca. sa.* are discontinued, and then administration *de bonis non, with the will annexed*, is granted, this administrator is not liable in any way for the costs of the proceedings on the *ca. sa.* *Hampton* v. *Cooper*, 580.

14. No action at law can be maintained, to collect the assets of a deceased man, except by his personal representative; but where A., claiming a slave as a distributee of B., employs C. to sell such slave, and accordingly sells the

slave and receives the price, he receives it for the use of A., and cannot dispute the title of A., but is bound to account with him for the sum received. *McNair* v. *McKay*, 602.

See Intestate's Estates; Damages.

FORMA PAUPERIS:

See Costs.

FRAUDS AND FRAUDULENT CONVEYANCES:

1. Under our act of assembly a man cannot be held to be a purchaser for a valuable consideration, who gives for the land not more than one-half or two-thirds of the value. *Harris* v. *DeGraffenreid*, 89.
2. Although one of the debts inserted in a deed of trust to secure several creditors be fraudulent, yet the legal title passes to him and his sale to a third person is valid. *Ib.*
3. A man being bound to maintain and support his father, conveyed a tract of land to his brother in trust to perform the conditions of that bond in the first place, and then out of the proceeds of the land to pay the other creditors of the maker of the deed. In the deed was contained the following clause: "The manner of executing the deed, as to the support of my father," is left to the discretion of the maker of the deed; *Held*, that this did not make the deed, on its face, fraudulent in law, for it reserved to the maker no control over the fund, but only the manner in which the father should be supported. *Gibson* v. *Walker*, 327.
4. The fact, that the debt to the father was prospective, as well as immediate, does not make it illegal to give it the preference. *Ib.*
5. Where a man makes an absolute conveyance of a chattel, purporting to be either a sale or a gift, and continues for a long time in the possession of the chattel, so purported to be conveyed, this creates, in law, a strong presumption, on which the jury should find the conveyance fraudulent, as against creditors, unless opposing and explanatory circumstances should rebut the presumption. *Foster* v. *Woodfin*, 339.
6. Fraud is never, exclusively, a question of fact, that is, in the sense of leaving it to the uncertain judgment of the jurors to give to the intent to convey upon a secret trust, or to the fact of credit being given to the grantor, upon his con-

tinuing in possession, such effect as to them, in each case, may seem proper, but, on the contrary, the effect of such an intent or false credit, if in fact existing, depends upon the fixed principles of the law. *Ib.*

7. When a deed of trust for the payment of debts conveys a cotton factory, &c., and in the deed are provisions, that the maker of the deed shall retain possession for eleven months and during that time his family may be supported out of the proceeds of the factory; *Held*, that these provisions did not make the deed fraudulent in law, upon its face, but, as the provisions might have been for the benefit of the creditors, as well as of the debtor, the question of fraudulent intent was one, upon which the jury must decide under all the circumstances. *Young* v. *Booe*, 347.

See Evidence; Contracts.

GRANTS:

See Presumptions.

GUARANTY:

On the guaranty of a note, the guarantee is not bound to show that he has made a demand on the maker, but the guarantor is only discharged, when it appears that he has suffered loss in consequence of the guarantee's not using due diligence. *Farrow* v. *Respess*, 170.

GUARDIAN AND WARD:

1. Where a guardian to an infant, appointed by a county court in this state, removes to another state, taking with him a part of the property of the infant, the court which made the appointment has the right to remove him, without notice, and appoint another in his place. *Cooke* v. *Beale*, 36.

2. Where a person, settling with a guardian, paid him, by mistake, more money than he was entitled to receive; *Held*, that he was entitled to recover the excess from the guardian individually. *Tow* v. *Elliott*, 51.

3. In charging a guardian, the mode of compounding interest is to make annual rests, making the aggregate of the principal and interest, due at the end of a particular year, a capital sum bearing six per cent. interest thenceforward for another year, and so on, with rests from year to year. But if a sum be found due at a rest day during the guardianship, that sum, being then converted into capital, is

entitled to draw interest thereafter until it shall be paid, and that is but simple interest, there being no subsequent rest made. *Ford* v. *Vandyke*, 227.

GUARDIANS:

The county court, on the petition of the guardian of a certain infant, passed the following order: "Ordered that he, the said W. B., guardian, sell the land, of said deceased T. H., or so much thereof as will be sufficient to discharge the debts"; *Held*, that this order was unauthorized and void, and, of course, that a purchaser under it acquired no title. *Ducket* v. *Skinner*, 431.

SEE EVIDENCE.

INDICTMENT:

1. The provisions of the act of 1811, ch. 814, Rev. Code, Revised Statutes, ch. 34, sec. 61, punishing the cheating by false tokens, &c., do not apply to the case of conveyances of lands. *State* v. *Burrows*, 477.
2. Where the charge intended to be made in such an indictment is, that the defendant intended to cheat the plaintiff out of twenty acres of land, the excess in quantity over thirty-five acres, the indictment should expressly aver that there was, in fact, such an excess of twenty acres. *Ib.*
3. Where the true ground of complaint was, that the defendant, by means of a forged paper, induced the prosecutor to execute a deed for 35½ acres of land instead of 55½ acres, thereby defrauding the prosecutor, the indictment should distinctly aver this fraudulent purpose; but, though this be a fraud, it does not come within the definition of any crime or misdemeanor known either to the common or statute law. *Ib.*

INSOLVENT DEBTORS:

1. A householder, who wishes to avail himself of the provisions of the act of assembly of 1844–45, ch. 32, Ire. Digested Manual, p. 118, may do so, by making application and procuring the assignment to be made according to the act of assembly, at any time, even after a levy of an execution or attachment, before the property is changed or converted by a sale. *State* v. *Floyd*, 496.
2. In the case of a proceeding under the insolvent debtor's law, the court has authority to permit the schedule to be amended, so as to make more certain the description of the

defendant's interest in matters there set forth, at any time before the oath is administered; and if the plaintiff is surprised, it is ground for a continuance. *McLeod* v. *Kirkham*, 509.

3. It is sufficient to file the evidence of the debts, set out in the schedule, which are in the possession and control of the defendant, at any time before the oath is administered. *Ib.*

4. It being a matter of public notoriety, that proclamation money is wholly worthless, it is not necessary to state in the schedule the amount thereof with nicety, or to file the same. *Ib.*

5. A bond, given by a person arrested on a *ca. sa.* for his appearance at court, is required by our law to be made payable to the plaintiff in the execution; a bond, otherwise payable, for that reason alone, will prevent the court from entering a summary judgment. *Williams* v. *Bryan*, 613.

6. Where a person, arrested on a *ca. sa.*, gives a bond payable to A. B., who makes the affidavit for the *ca. sa.* and styles himself the agent of C. D., the plaintiff, no action can be maintained on such bond, in the name of D., for he is not the obligee. *Ib.*

INTEREST:

1. When A., a citizen of Georgia, being in this state, offered to lend to B. six thousand dollars, but on his return to Georgia, not having sold his cotton crop, wrote to B. that he could only lend three thousand dollars, whereupon B. went to Georgia, there received the money and executed his note for that amount; *Held*, that B. was bound to pay eight per cent., the interest according to the laws of Georgia. *Davis* v. *Coleman*, 303.

2. The party, who sues to recover the stipulated damages, is not entitled to claim interest, even from the date of his writ. *Devereux* v. *Burgwin*, 490.

3. In England the rule is, that interest is to be allowed, where there has been an express provision to pay interest, or where such promise is to be *implied* from the usage of trade, or other circumstances. But for goods sold, money lent, money paid, work and labor done, or on a guarantee, interest is not allowed unless there be an express or implied agreement. Our decisions have extended the rule, and for money lent, or money paid or had and received, or due on an account stated, the jury ought to be instructed to

allow interest, the promise to pay being implied from the nature of the transaction. And in trover and trespass *de bonis asportatis*, the jury may, in their discretion, allow interest upon the value, from the time of the conversion or seizure, as a part of the damages, so as to compel the wrong-doer to make full compensation, by charging him with the price, as at a *cash sale*. *Ib.*

INTESTATE'S ESTATES:

1. An advancement to a husband by his father-in-law is an advancement to the wife. *Bridgers* v. *Hutchins*, 68.
2. The release or cancelling of the bonds of a child, with an intention thereby to prefer him in life, is as much an advancement as so much cash. *Ib.*
3. In order to constitute an advancement of a slave by parol gift, there must be an actual delivery and change of possession. *Meadows* v. *Meadows*, 148.
4. While a son continues to reside with his father the gift has no operation, but when he removes and takes the slave with him, the advancement becomes effectual and its value must be estimated at that period. *Ib.*
5. A child does not lose the benefit of an advancement of a slave by selling it. *Ib.*
6. Advancements are understood to be gifts of money or personal property for the preferment and settling of a child in life, and not such as are mere presents of small value or such as are required for the maintenance or education of the child. *Ib.*

JURISDICTION:

1. A *ca. sa.*, issued by a justice of the peace in Buncombe county, ought to be returned to the county court of that county, notwithstanding the provisions of the act of 1844, abolishing jury trials in the county courts of Buncombe. *Fox* v. *Wood*, 213.
2. Where a suit is commenced in the superior court for a less sum than sixty dollars for goods, &c., sold, or for a less sum than one hundred due by note, &c., the suit shall be dismissed; and if the party demands more in his writ for the purpose of evading the law, and the jury finds that a less sum is due to him than that of which the court has jurisdiction, he shall be nonsuited: provided that if the party will make affidavit that the sum, for which he has

sued, is really due, but he cannot establish it for want of proof, or that the time limited for the recovery of an article bars a recovery, then the plaintiff shall have judgment, &c. *Parham* v. *Hardin*, 219.

3. *Held*, that the same rules apply to suits in the superior court of Cleveland county, removed under the private acts of 1844 and 1846, from the county to the superior court of that county. *Ib.*

4. A. being a surety for B., to indemnify him B. gave him a lien on some hogs. B. afterwards sold the hogs to C. A. refused to deliver the hogs, unless C. would agree to pay the debt for which A. was bound. This C. promised, but failed to make payment, and A. had to pay the debt himself. He then warranted C. for the money so paid; *Held*, that a justice of the peace had no jurisdiction in the case. *Cogle* v. *Hamilton*, 231.

5. Under the act of 1848, relating to the county of Polk, all the records, transferred to the superior court of Polk from the county of Rutherford, are directed to be returned to the superior court of Rutherford county, the act of 1846 establishing the superior courts in Polk having been repealed by the act of 1848; *Held*, that the superior court of Rutherford had the right to issue an execution on a judgment, rendered in the county of Polk, while the latter had jurisdiction, as to cases from the former county, removed by the act of 1846 and transferred by the act of 1848. *Matthews* v. *Gilreath*, 244.

6. Where a petition had been filed in the county court by the next of kin of an intestate for the sale of negroes for the purpose of distribution, and a sale had been made by a commissioner appointed by the court, according to the prayer of the petitioners, and he had paid over to them what he alleged to be their full respective shares; it is not competent for these petitioners to file a subsequent, original petition in the same court, charging that the commissioner had not paid them their full shares, (they having signed a receipt in full by a mistake) and requiring the commissioner to account, &c., and pay over the balance, &c. *Reid* v. *Pass*, 589.

7. Their relief could only be obtained by an application to the county court for a rehearing, if the proceedings of the commissioner had been confirmed, or by recourse to a Court of Equity to set aside the receipt, if given through mistake. *Ib.*

8. A court of equity has a general jurisdiction to direct the sales of the estates of infants, wherever the purpose, for which the sale is directed, shall be deemed by the court beneficial to infants. *Williams* v. *Harrington*, 616.

9. The decree in such a case cannot be impeached in any other case: neither upon the ground, that a guardian was not appointed by the proper court, nor that there was not due advertisement or competent evidence of it, nor that the interest of the infant was not promoted by the sale, nor that the decree did not find the facts, which shewed the sale to be beneficial, nor upon any similar grounds. *Ib.*

10. Where a decree is made, on behalf of infants, for the sale of "the lands of the deceased debtor lying in Moore county," and a sale is made of several specified parcels of land, the sale ratified, and an order of the Court to convey to a particular purchaser, no exception can be taken to the general description of the land in the decree ordering the sale. *Ib.*

11. The Court has the power, with the consent of the purchaser, to substitute another person in his place; though, as a matter of wholesome practice, such a substitution ought not to be allowed, before the payment of the purchase money, nor, perhaps, without looking to the rights, even of third persons, as against the first purchaser. *Ib.*

12. Under an order of the court of equity for the sale of the real estate of infants, the deed of the commissioner appointed to make the sale, by virtue of the provisions of the act of 1827, transferred to the purchaser the legal title. *Ib.*

JUSTICES OF THE PEACE:

1. The preamble to a warrant constitutes a part of it, and where it sets out, in apt words, the offence, for which, as the plaintiff alleged, the defendant had incurred the penalty sued for, the form is a proper one. *Harshaw* v. *Crow*, 240.

2. A seal is essential to a warrant, issued by a magistrate to arrest a person for a criminal offence, and, if there be no seal, the warrant is void, and the defendant is justified in resisting its execution. *State* v. *Worley*, 242.

SEE JURISDICTION.

LARCENY:

1. Turpentine, which has run out of the boxes cut into the tree for the purpose of receiving the liquid, is the subject of larceny. *State* v. *Moore*, 70.
2. But to support an indictment for stealing two barrels of turpentine, it must appear that the turpentine was in barrels when it was stolen, not that it was dipt from the boxes in small quantities, from time to time, and then deposited in barrels. *Ib.*

LAWS OF OTHER STATES:

See Evidence.

LEGACIES:

1. An infant mulatto child was found at the door of a gentleman, who took charge of it, and it remained in his possession for more than seven years, he professing that he did not claim her as a slave, but believed she was free, and refused to deliver her to any person, who could not show a good title to her as a slave. At his death, he left her two hundred dollars; *Held*, *first*, that, if she was free, of course the next of kin could not claim distribution of her or of the legacy; *secondly*, if she was a slave, the next of kin were entitled to distribution of the legacy, and also of the girl herself, if he had her three years or more in adverse possession; and that, to vest the title of the slave in him, by virtue of the statute, it was not necessary that he should have claimed her as a slave. *State* v. *Jones*, 154.
2. When slaves, by a will made by a testator in South Carolina, were directed to be emancipated, and then the testator says "all the balance of my estate to belong to C. J.;" *Held*, that C. J. could not claim these negroes at law under the residuary clause, even if the bequest for emancipation were void by the laws of South Carolina, because they did not pass by the words of the residuary clause, but only fell into the residue of the operation of the law, and C. J.'s title was only an equitable one. *Jones* v. *Abernathy*, 280.
3. A testatrix bequeathed as follows, "My girl Maria, after my death, I do not leave her as a bond slave to any person; I wish her to live among my children, or otherwise if she sees proper. I leave J. S. to act as trustee for said girl." Also, "I will and bequeath twenty-five dollars to Maria;" *Held*, that, under this will, J. S. took the legal title to the girl Maria. *Simpson* v. *King*, 377.

LESSOR AND LESSEE:

See Taxes.

LIMITATIONS, STATUTE OF:

1. A promise of a party that he will settle with another will only take a claim out of the statute of limitations, when it clearly appears that the promise referred to that particular claim. *Arey* v. *Stephenson*, 86.

2. Where, to an action on a justice's judgment, the defendant pleads "the statute of limitations, the plaintiff cannot reply, "a new promise within the seven years." The replication of a new promise is confined to actions "on promises." *Taylor* v. *Spivey*, 427.

3. After a debt had been barred by the statute of limitations, the debtor said to the creditor, "unless J. R. has paid it for me, it is a just debt and I will pay it;" and again, "it is a just debt and it will pay it, if I cannot prove that it has been settled by J. R.;" *Held*, that the case was thereby taken out of the statute. By such declarations, the *onus* of proof that the debt had been paid rested on the defendant. *Richmond* v. *Fuqua*, 445.

4. Where a plaintiff in an action of assumpsit, in order to bar the operation of the statute of limitations, gives in evidence words used by the defendant, the language must be such as, without straining, imports a willingness and intention thereby to assume the debt, or amounts to an unequivocal acknowledgment of its subsistence and obligation. *Taylor* v. *Stedman*, 447.

5. In a conversation between the plaintiff and the defendant, in relation to the matter in dispute, the former said to the latter, "that matter about Frank's hire in 1842 must be fixed," when the latter asked, "will not other notes or judgments do instead of my note?" and the plaintiff remarking, "yes, if they are good," nothing further passed between them; *Held*, that the defendant's expressions did not revive the debt, and bar the operation of the statute. *Ib.*

See Demand; Legacies; Penal Actions.

MALICIOUS PROSECUTION:

1. The verdict of a petit jury, acquitting a man indicted for a conspiracy, does not, in an action for malicious prosecution, support the averment, that the indictment was without probable cause. *Bell* v. *Pearcy*, 233.

2. In an action for malicious prosecution, the plaintiff must shew particular malice on the part of the defendant towards him. *Brooks* v. *Jones*, 260.

3. This particular malice may be proven by positive testimony of threats or expressions of ill will, used by the defendant in reference to the plaintiff, or it may be *inferred* from the want of probable cause and other circumstances, such as, in this case, are apt to engender angry feelings. *Ib.*

MILLS:

The owner of land, injured by the erection of a mill, who has proceeded by petition, under which the annual damage assessed is as high as twenty dollars, and who has taken judgment for, and received the damage for, the whole five years, cannot maintain an action on the case, brought after the expiration of the five years, without having again ascertained the annual damage by proceeding under a second petition. *Gilliam* v. *Canaday*, 106.

NAVIGABLE WATERS:

That "all waters which are actually navigable for sea vessels are to be considered navigable waters, without regard to the ebb and flow of the tide, and that no one is entitled to the exclusive right of fishing in any navigable water, unless such right be derived from an express grant by the sovereign power, or, perhaps, by such a length and kind of possession, as will cause a presumption of such grant to arise," must now be deemed the settled law of this state. *Fagan* v. *Armistead*, 433.

OVERSEER:

An overseer is not strictly a bailee, though many of the principles of that relation and many of its duties attach to him. It is his duty to take such care of the property entrusted to him, as a man of ordinary prudence would take of his own property. *Smith* v. *Cameron*, 572.

See Roads.

PARTNERS:

1. On a separate judgment against one partner for a partnership debt, only the interest of that partner, in any portion of the partnership property, can be sold by execution. *Price* v. *Hunt*, 42.

2. The effects of a firm are not subject to attachment for the separate debt of one of the partners. *Cook* v. *Arthur*, 407.

PAYMENTS.

It is the rule in this country to apply payments to the debt, for which the security is the most precarious, when no application is made by the party who pays. *State* v. *Thomas*, 251.

PENAL ACTIONS:

A common informer cannot recover a penalty, unless he sue within the period allowed by the act imposing the penalty. As where a penalty is imposed on persons fishing in the Roanoke river at certain times, and any person may sue for the same, provided he does so within one month from the forfeiture, and if no such suit is brought within that period, the law-officer of the state is directed to sue for the use of the state, (act of 1827, ch. 54,) it was held that, after the expiration of the month, the right of the common informer was gone. *Fagan* v. *Armistead*, 433.

PLEADING, PROCESS AND PRACTICE:

1. Where there is an action on a bond against two obligors, and a nonsuit is entered as to one, this is no *retraxit* as to him. *Crawford* v. *Glass*, 118.

2. On a *scire facias* against heirs to subject the lands of their ancestor, it is too late for them, after they have appeared and pleaded to the *scire facias*, to move to dismiss the proceedings because no declaration has been served on them, although some of the heirs may have been infants. *Tripp* v. *Potter*, 121.

3. Where a *scire facias* has been sued out upon a judgment, and while it is in the sheriff's hands, the parties agreed that the collection of the money should be suspended, so as to enable them to make a full settlement, yet the sheriff is not thereby excused from returning the process, but is liable to an amercement, if he fails to do so. *Morrow* v. *Allison*, 219.

4. The act of 1826, Rev. Stat., ch. 31, sec. 119, authorizing references to be made in courts of law to state the accounts of administrators, executors and guardians, applies only to suits brought upon their bonds respectively. It does not apply to suits, brought upon bonds given by a testator or intestate, in which fully administered is pleaded. *Lynch* v. *Johnson*, 224.

5. Where an assignee of a bond brings an action of debt upon the bond, and the defendant pleads *non est factum* only,

this plea does not deny the assignment. But, if the action be on the case, as given by our statute to the assignee of a bond, the general issue denies both the execution of the bond and the endorsement. *Ford* v. *Vandyke*, 227.

6. The plea of payment to an action on a judgment, &c., is sufficient to cover the defense of a presumption of payment or abandonment of claim under our act of 1826. *Butts* v. *Patton*, 262.

7. Where a man, who is liable to militia duty, is arrested on a civil process while he is attending a militia muster, in violation of the act of assembly, he may plead the same in abatement. *Murphy* v. *McCombs*, 274.

8. That the plaintiff, who sues as executor, is not an executor, is a plea in bar, and the defendant may plead it with any other bar. *Shown* v. *Barr*, 296.

9. In cases of verdicts, subject to the opinion of the court, all the points, on which either party means to insist, ought not to be reserved, for all points not reserved are taken to be given up. If one of the parties cannot have inserted a question, on which the presiding judge inclines against him, he ought not to consent to such a verdict, but peremptorily claim that an opinion shall then be given to the jury, as he has a right to do. *Brooks* v. *Ratcliff*, 321.

10. Where an action was brought in the name of James Brooks, William E. Colton and William E. Churchill, partners trading under the name and firm of "Brooks, Colton and Company," and the judgment was in the name of Brooks, Colton & Co.; *Held*, that this was a variance, for which the judgment might have been reserved at common law, but the error was cured by our statute of amendments, Rev. Stat. ch. 3, sec. 5. *Ib.*

11. The acts of a ministerial officer, as a constable or sheriff, in making returns on warrants and writs, although required by law to be returned into a court of record, do not make a part of the *record*, are only *prima facie* taken to be true, and may be contradicted and shewn to be false, antedated, &c. *Patterson* v. *Britt*, 383.

12. A reference to the clerk of the court to take and report the accounts of an executor, administrator or guardian, can only be made under the act of 1826, Rev. Stat., ch. 31, sec. 119, in a suit brought upon the bond given by such executor, administrator or guardian for the faithful performance of his duty. *Anderson* v. *Jernigan*, 414.

13. Where one has a cause of action against another, accruing *after a demand* made, the suing out of a writ for that cause of action, though the writ was in assumpsit, when it should have been in covenant, is a demand in the strongest form. *Nixon* v. *Long*, 428.

14. Where several cases have been decided upon the same question, after argument, the court will not reconsider the grounds of those decisions, especially upon a case presented without argument. *Fagan* v. *Armistead*, 433.

15. When both parties appeal from a judgment, the clerks of the superior courts must make out two transcripts, so as to constitute, as there really are, two cases in the Supreme Court. When this is neglected, the clerk of the Supreme Court will state two cases on his docket, and charge costs in each case. *Devereux* v. *Burgwin*, 490.

16. There is a distinction between a cause for a *new trial* and a cause for a *mistrial;* the former is a matter of discretion —the latter a matter of law. *State* v. *Tilghman*, 513.

17. Where, on a trial, the circumstances are such, as merely to put suspicion on the verdict, by shewing, not that there *was*, but that there might have been, undue influence brought to bear on the jury, because there was opportunity and a chance for it; it is a matter within the discretion of the presiding judge. But *if the fact be*, that undue influence was brought to bear on the jury; as if they were fed at the charge of the prosecutor or the prisoner; or if they be solicited and advised how their verdict should be; or if they hear other evidence than that which was offered on the trial; in all such cases, there has been, in contemplation of law, *no trial*, and this Court, as a matter of law, will direct a trial to be had, whether the former proceeding purports to have acquitted or convicted the prisoner. *Ib.*

18. Where the facts, in relation to the jury, on a trial for murder, were, that the jury were placed in the charge of an officer and confined in the ordinary jury room; that they retired from the court on Thursday at 6 P. M. and rendered their verdict on Saturday at 10 A. M.; that while out, the members of the jury separated at various times to obey calls of nature—that each one separated himself from the others, more than once for this purpose, and one of them as often as six times; that, when they did this, they went, one at a time, under charge of an officer, and, during such absence, the other jurors remained together in the

jury room, with the door locked; that they went about fifty yards from the court-house, and returned as soon as practicable, holding no intercourse with any one; that one of the jurors separated himself from his fellows, and visited a drug store, about one hundred and fifty yards from the jury room, for the purpose of procuring medicine, being sick; that he went under the charge of an officer, and held no conversation except with the keeper of the drug store, who asked him if they had agreed on their verdict, to which he replied "they had not;" that this store was in the most public place in the town of Newbern; that another juror separated himself from his fellows and stood on the outside of the jury room near the door, closed, and conversed privately for ten or fifteen minutes with a third person, but what was said did not appear; that the jurors also ate and drank while out, but not to excess; that a part of the time they did so with the permission of the court, but when enjoined by the court not to eat or drink, they violated this injunction, contrary to the wishes of the officer, who had them in charge; that several jurors wrote notes and dropped them from the windows of the jury room, and also received notes from persons not of the jury, but neither the contents of the notes nor the names of the persons, to whom sent or from whom received, appeared; that some of the jurors conversed from the windows with persons in the street on various subjects, and about this suit, but what was said did not appear; and that some servants and small children had access to the jury room, the servants for the purpose of carrying food and clothing to the jurors, and the children to see their fathers; *Held*, that these facts might, in the discretion of the presiding judge, have been a good cause for granting a new trial, but they could not justify the court in declaring as a matter of law, that there was a mistrial. *Ib.*

19. Although it be not error to refrain from giving instructions, unless they be asked for, yet the judge, when he does give instructions, either of his own motion or at the party's, should give them in such a way, that they be not in themselves erroneous, or so framed as to mislead the jury. *Bynum* v *Bynum*, 632.

See Attachments; Emancipation.

PRESUMPTIONS:

1. In order to raise the presumption of the grant of an ease-

ment, two things are necessary: there must be a thing capable of being granted, and there must be an adverse possession or assertion of right, so as to expose the party to an action, unless he had a grant. *Felton* v. *Simpson*, 84.

2. *It seems* that the presumption of the death of an individual, arising from his absence from his domicil for seven years, does not imply that he died at the end of the seven years, but that he died either then or at some other period during the seven years. *State* v. *Moore*, 160.

3. Under the statute of 1826, Rev. Stat., ch. 65, sec. 14, the presumption of the payment or satisfaction of a judgment does not arise, until ten years after the plaintiff has ceased to prosecute his judgment, that is, until ten years after the day of the return of his last execution. *Butts* v. *Patton*, 262.

4. It is established, as a general proposition, that from a long and peaceable possession of land, upon a claim of the right, a presumption arises, that the possession was rightful, and therefore was under such grant, deeds and assurances, as are necessary to impart to it that character. *Bullard* v. *Barksdale*, 461.

5. The presumption is not deduced as an inference of fact from the possession, as evidence merely and according to its influence on the minds of the jury, in producing, or failing to produce, a conviction, that the presumption is according to the truth, but the deduction is made, without regard to the very fact, by a rule in the law of evidence. *Ib.*

6. The force of this presumption is not destroyed or in any degree repelled by evidence, which renders it probable, that, in truth, a grant was issued. *Ib.*

7. The grant is presumed, not because the jury believed that one issued, but because there is no proof, that it did not issue; indeed, in the nature of things, it would seem, that there can be no sufficient negative proof of the kind supposed. *Ib.*

8. Where a long possession, under a claim of title by a grant, as in this case of forty-five years, has been proved, and to rebut the presumption it was shewn that the party so claiming was unable to produce a grant, declared his belief that it never existed, and made efforts to obtain another grant; the court ought not to have submitted to the jury, upon this evidence, to find whether there was a

grant or not, but should have instructed them, that, from the possession alleged, they should presume a grant, and, as matter of law, that there was no evidence to oppose and repel the presumption. *Ib.*

REWARD:

1. Where an action is brought by a plaintiff to recover the amount of a reward, offered by the defendant, for the apprehension and delivery in jail of an individual charged with a criminal offence, it is incumbent on the plaintiff to prove that he either compelled the individual by force, or induced him by persuasion, to make the surrender. *Currie* v. *Swindall*, 361.
2. If the surrender of such individual was wholly voluntary, although the plaintiff accompanied him to the jail and saw him lodged there, he has no right of action. *Ib.*
3. Where an agent is authorized to offer a reward for the apprehension of an individual, it is only necessary to prove that this was done—the mode of doing it is entirely immaterial. *Ib.*

ROADS:

1. When a petition is filed to discontinue an old road between certain points and establish a new one between the same points, and the petition is opposed, and the court, upon the hearing, refuse to discontinue the old road and establish a new road as prayed for, but direct another road to be opened, passing over only a part of the route prayed for by the petitioners; *Held*, that the defendants were entitled to recover their costs. *Davis* v. *Hill*, 9.
2. An overseer of a public road has no right, at his discretion, to widen the road. This can only be done by a jury under the direction of the county court. *Small* v. *Eason*, 94.
3. If the weather is so bad, as to prevent an overseer from working on the road, or to render unavailing any work he might do, he ought to be excused. *State* v. *Small*, 571.
4. Where a charter has been granted for a turnpike road and the road opened, the county court has no right to convert it into a public road, unless the charter has been duly surrendered, or, from a *non-user* for twenty years, a dedication to the public may be presumed. *State* v. *Johnson*, 647.
5. Even in such case the road can only be made a public road in the manner prescribed by the act of assembly. The

mere appointment of an overseer will not be sufficient for that purpose. *Ib.*

SEE EVIDENCE.

SALES:

Property passes by a sale and delivery, notwithstanding an *executory* agreement to sell to another, and the receipt of a part of the price. *Wilson* v. *Purcell*, 502.

SEE AGENT AND PRINCIPAL.

SET-OFF:

1. It is the settled law in this state, that a debt, due by an assignor of a bond or note at the date of the assignment, may be pleaded, as a set off to an action by an assignee after maturity; but this departure from the statute, Rev. Stat., ch. 31, sec. 80, is put on the ground, that a liberal construction is necessary to prevent evasion and injustice. *Wharton* v. *Hopkins*, 505.
2. Where it is shewn this injustice will not result, the rule is different. As when the assignor, at the date of the assignment, had an account against the defendant in the action, larger in amount than that which is attempted to be set off; *Held*, that the defendant could not avail himself of his account, as a set-off, in an action by an assignee, on a note or bond assigned after maturity. *Ib.*

SHERIFFS:

1. The sureties on the official bond of the sheriff are not liable for a trespass committed by him under color of his office. *State* v. *Brown*, 141.
2. A sheriff cannot be made responsible for the acts of a constable, who sometimes acted as his deputy but never without a special deputation, and who has committed a trespass by levying a void attachment, unless it can be shewn that he was expressly authorized by the sheriff to levy such attachment. *Patterson* v. *Britt*, 383.
3. Much less can he be responsible, when the constable returns the attachment levied by him *as constable*, although by an order of court the return is permitted to be amended by stating the levy to have been made by *the sheriff* by the said constable as his deputy, the sheriff's office having then expired and the order of amendment having been appealed from. *Ib.*

SLANDER :

1. In an action of slander, when the charge is made by using a cant phrase or a nickname, or when advantage is taken of the fact, known to the persons spoken to, in order to convey a meaning, which they understood by connecting the words (of themselves unmeaning) with such fact, the plaintiff is obliged to make an averment of the meaning of such cant phrases or nickname, or of the existence of such collateral fact, for the purpose of giving point to the words and of shewing that the defendant meant to make the charge complained of ; and, in such cases, there must also be an averment, that the words were so understood by the persons to whom they were addressed. *Briggs* v. *Byrd*, 353.
2. These averments are traversable and must be proven, and differ entirely from what are called innuendoes, which need no proof. *Ib.*

See Evidence.

SLAVES :

See Legacies.

SURETY AND PRINCIPAL :

A surety, who has paid money for his principal, cannot sue him in an action of *tort*. *Ledbetter* v. *Torney*, 294.

See Sheriffs.

TAXES :

1. In this state, land is taxed according to its fee simple value, and whoever is owner of the land for the time being is bound to pay the tax : as if an estate is limited to A. for life or for ten years, remainder to B. and his heirs, the valuation is assessed, without reference to this division, and each must pay the tax, during the time that he is the owner and enjoys the possession and pernacy of the profits. *Willard* v. *Blount*, 624.
2. It is otherwise in the case of landlord and tenant, *where rent is reserved*, for the rent is in lieu of the land, and the landlord is *in the pernancy of the profits of the land :* and if the tenant is compelled to pay the tax, he may recover from the landlord, or deduct the amount out of the rent. *Ib.*

TRESPASS :

Under the act of 1840, ch. 37, which gives to a tenant the rent

to be paid in a part of the crop, a certain interest in the crop raised; if the tenant remains in possession until an execution against him is levied on the whole of the crop, although the landlord *may* have a special action on the case against the officer levying, yet he cannot maintain an action of trespass, for he has neither the possession nor the property. *Peebles* v. *Lassiter*, 93.

TRESPASS FOR MESNE PROFITS:

SEE EJECTMENT.

TRESPASS Q. C. F.:

1. The action of trespass *quare clausum fregit* is a remedy for an injury to the possession, and therefore cannot be maintained by one who had not the possession, at the time the injury was alleged to have been committed. *Patterson* v. *Bodenhammer*, 4.

2. Tenants in common may, in general, sue separately for trespasses on real estate, yet they may also join in such actio n in respect to the injury being to their joint possession. *Camp* v. *Holmesly*, 211.

3. A. and B. being infants and tenants in common of a tract of land, C. their mother, who was the administratrix of their deceased father, rented out the land to D., who entered into possession of it. The infants afterwards brought a bill in equity against C. for an account of their estate and charged her with having acted as their guardian in renting out the land, and obtained a decree for the amount ascertained to be due, including the rent; but it did not appear that the decree had been satisfied; *Held*, that D., not being a party to these proceedings in equity, nor a privy to either of the parties, could not avail himself of them, so as to prevent his being sued as a trespasser. *Hardy* v. *Williams*, 499.

TROVER:

1. To sustain the action of trover, the right of property in the thing claimed and of possession, at the time of the alleged conversion, must be vested in the plaintiff. *Brazier* v. *Ansley*, 12.

2. In an action of trover, except for a mere temporary conversion, the plaintiff recovers the value of the property recovered, and, therefore, to entitle him to recover, he must shew title and a possession, or a present right of possession. *Barwick* v *Barwick*, 80.

3. A negro slave was permitted by his master to own a horse. Afterwards the negro was sold to A., and the horse was taken to the latter's house. A. directed the negro to take the horse away, and he was accordingly given to the negro's son, who was the slave of B. B. set up no claim to the horse and the slave sold him to another person; *Held*, that A. could support no action against B. for the value of the horse. *Francis* v. *Welch*, 215.

4. A judgment, either before a magistrate or in a court of record, is not the subject of an action of trover and conversion; nor is a note, on which a judgment has been obtained, because it is merged in the judgment and is defunct. *Platt* v. *Potts*, 266.

5. Trover will lie for promissory notes, by the administrator of the payee, against a donee by oral gift, though the gift be accompanied by delivery. *Brickhouse* v. *Brickhouse*, 404.

6. A recovery in trover for a note or bill and payment of the damages divest the property out of the plaintiff, and, indeed, vest it in the defendant, as between him and the plaintiff. *Ib.*

7. A conversion, to subject a defendant in an action of trover, consists either in an appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it, in exclusion or defiance of the plaintiff's rights, or in withholding the possession from the plaintiff, under a claim of right, inconsistent with his own. *Glover* v. *Reddick*, 582.

8. Giving to a negro a certificate that he is free, does not amount to a conversion in the person giving the certificate, if the negro should turn out to be a slave. *Ib.*

TURNPIKE COMPANY:

The true construction of the act of assembly, incorporating the Hickory Nut Turnpike Company, is, that the State road, where it crosses the Blue Ridge at Hickory Nut Gap, is not abrogated by the said charter, but is to be continued and kept in repair by the road overseers in their respective counties, until the turnpike is completed, and that the company, for the purpose of constructing the turnpike, has the privilege, when it is located along the State road, to enter upon it, and obstruct it, when, where, and as long as is reasonably necessary, to enable them to make their improvements, and, when it is located near the

State road, the same privilege is conferred, to be exercised in a reasonable manner, in referrence to the interest of the company and the convenience of the public, the latter being made, for a reasonable time, to give place to the former. *Adams* v. *Hick. Nut Gap Turnpike Co.*, 486.

USURY:

See Interest.

VENDOR AND VENDEE:

1. In general, a vendor of land is bound to prepare the conveyance and tender it or offer to do so, but where, from the nature of the contract it appears that those, to whom the title was to be made, were unknown to the vendor, but known to him who made the purchase, the latter is bound to give the necessary information to the vendor, or, if he fails, to pay the price contracted for. *Christian* v. *Nixon*, 1.
2. A vendee, by contract for the sale of a tract of land, can maintain an action upon the bond for title, without having made a payment or tender of the whole of the purchase money, when, by a sale of the property, it is put out of the power of the vendor to make the conveyance, at the time the vendee has a right to call for it. *Nichols* v. *Freeman*, 99.
3. And it makes no difference, whether the vendor himself has made the conveyance, or whether it has been made by a sheriff under process of law. *Ib.*
4. In such a case, the measure of damage is the difference between the real value of the property at the time of the breach, and the amount of the purchase money, remaining unpaid. *Ibid.*

See Contract; Warranty.

VENDEE:

See Auction.

WARRANT:

See Justices.

WARRANTY:

1. No warranty of quality is *implied* in the sale of goods. *Dickson* v. *Jordan*, 166.
2. If a vendor sells articles, apparently of the kind ordered by the vendee, though the vendee has no opportunity of

testing the quality, until after he has used them, yet, if there be no fraud on the part of the vendor, the purchaser must bear the loss, if it turns out that there is a defect in the articles. *Ib.*

3. One may recover in an action of covenant or assumpsit, on a bill of sale for a slave, for a warranty of the soundness of the slave, although there be no witness to the bill of sale. *Maxwell* v. *Miller*, 272.

See Action on the Case.

WILLS:

1. In a controversy respecting the probate of a will, any person who is entitled in interest may become an actor. The course is to state on the record such matter as shews on which side the person becomes an actor, so as to shew distinctly, whether he may in the result be entitled to or liable for the costs. *Benjamin* v. *Teel*, 49.

2. A person, named as executor, is not competent as an attesting witness to a will of personalty. Nor will his subsequent renunciation and release make him so. He must be disinterested at the time of attestation. *Morton* v. *Ingram*, 368.

3. In order to satisfy that part of the law, which requires the attestation of subscribing witnesses to a will to be *in the presence* of the testator, it is sufficient if the attestation be in the same room in which he is, provided it be not done in a clandestine, fraudulent way, which would not be in the party's presence. *Bynum* v. *Bynum*, 632.

4. Where two persons agree to make mutual wills, it *would seem*, that bad faith in the one, either in not making his will or in concealing it after it was made, will not prevent the probate of the will of the other party. *Ib.*

WITNESSES:

See Costs.

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